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THE
LAW OF INSURANCE

FIRE, LIFE, ACCIDENT, GUARANTEE

BY

WILLIAM A. KERR

OF THE MINNEAPOLIS BAR

ST. PAUL, MINN.:
KEEFE-DAVIDSON CO.

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PREFACE.

To treat comprehensively, yet tersely, of a large matter is always difficult. In the attempt to condense this work within the compass of a single volume, I have been obliged to treat but sparingly of many features worthy of extended discussion. It has been my aim herein to furnish to the practitioner and the student of non-maritime insurance a brief statement of the law thereof in such form as will, with the aid of the references and citations given, be a convenient aid and guide to investigation.

WILLIAM A. KERR.

MINNEAPOLIS, MINN.,

March 15, 1902.

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THE ORIGIN OF INSURANCE.

§ 1. Insurance law is generally conceded to have had its origin in the ancient marine law and customs of merchants.

The origin of insurance is uncertain. By some it is asserted to have existed in the time of the Roman Empire; others fix the date of its birth at a much later period. It is generally conceded that it is the product of the necessities of maritime commerce with its attendant risks and hazards; and that all kinds of insurance known at the present day are but the result of the development of the principles of marine insurance, adapted to the expansion and progress of commerce and business enterprise and extended to cover the advancing and everchanging demands of both public and individual necessities. The antiquity and the public advantage of the

business was long ago recognized by the parliament of England in the passage of the Statute 43 Eliz. c. 12, which recites the immemorial usage of policies of insurance "by means whereof it cometh to pass, upon the loss or perishing of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavily upon few, and rather upon them that adventure not than upon those that do adventure; whereby all merchants, especially those of the younger sort, are allowed to venture more willingly and more freely."

GENERAL CLASSIFICATION.

§ 2. Generally speaking, insurance is divided into two classes, viz.:

(a) Insurance by act and operation of law.

(b) Insurance by contract, e. g.:

- (1) Oral, or
- (2) Written.

Within the class first mentioned is embraced that insurance which is created and exists solely by implication and operation of law, as in the case of common carriers and warehousemen. While goods are in the custody of a railway company as a common carrier, it is subject to the full common-law liabilities attaching to common or public carriers; which is to say that it is liable as an absolute insurer against all loss, damage or injury arising in any manner other than from certain excepted causes. A railway also may be considered as an insurer against damage or loss caused by fire communicated through its engines. It is also liable for the damage or destruction by fire, while in its charge, of cars which it has received for transportation from other companies. So a bailee or warehouseman is often, and in many respects, a guarantor or insurer of the safe keeping of goods and chattels intrusted to his care.

Within the second class is embraced that kind and class of insurance which is created and exists solely because of the making of special and express contracts between parties, whereby each does or agrees to do some particular thing or things under certain conditions; for instance the one to pay a premium or consideration for the obligation of the other, who in turn undertakes therefor to give certain indemnity or make certain payments to the former should certain things happen or certain contingent events occur. These contracts may be either oral or in writing.

We are here concerned only with insurance of the second class and the law applicable thereto.

INSURANCE BY CONTRACT — DEFINITIONS.

§ 3. An insurance contract is an agreement whereby one party, for a consideration,

- (a) Agrees to indemnify another party to a specified amount against loss or damage from specified causes, or
- (b) Agrees to pay to another a certain sum of money on the happening of a given contingency or event.¹

¹ "Insurance, strictly defined, is a contract whereby one, for a consideration, agrees to indemnify another for liability, damage, or loss by certain perils to which the subject may be exposed; but the contracts of life insurance and of accident insurance covering death are not strictly contracts of indemnity." Joyce, Ins. § 2.

"Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss. * * * It is substantially the definition given long ago by Roccus, and is recommended alike by its brevity and its comprehensiveness,—qualities upon which subsequent writers have scarcely been able to improve." May, Ins. § 1.

"A contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other, that he shall not suffer loss, damage, or prejudice, by the happening of the perils specified to certain things, which may be exposed to them." *Lucena v. Craufurd*, 2 Bos. & P. (N. R.) 300, 6 Rev. Re-

SAME — DIVISIONS.

§ 4. There are seven different classes of insurance, viz.:

- (a) Fire insurance;
- (b) Life insurance;
- (c) Marine insurance;
- (d) Accident insurance;
- (e) Casualty insurance;
- (f) Guaranty insurance;
- (g) Real estate and title insurance.

§ 5. These all partake of the same nature, and proceed upon the same general plan, but differ in the application of their common principles to the varying risks and conditions.

§ 6. A fire insurance contract is an agreement whereby one, for a consideration, agrees to protect another, in whole or in part, against loss or damage by fire to the property insured within the time specified.²

§ 7. Life insurance is a contract in which one party, in consideration of a gross sum or of periodical payments, agrees to pay a sum certain

- (a) Upon the death of the life insured, or
- (b) At some other fixed time or times.³

ports, 685. "A contract to make compensation (or pay) on the happening of an injury to life or property." Cooke, Life Ins. § 1. And see *State v. Federal Inv. Co.*, 48 Minn. 110.

For definition of "Reinsurance," see post, ch. 19; *Barnes v. Hekla Fire Ins. Co.*, 56 Minn. 38.

² Biddle (vol. 1, §§ 1, 2) says that the general term "insurance" "is applied to two species of contract,—insurance in respect of property, and insurance in respect of life,—which are not analogous in their elements, and which proceed upon different principles."

Insurance in respect of property he defines as "an agreement by the insurer, for a consideration, to indemnify the insured against loss, damage, or prejudice to certain property that may be during a certain period sustained, by reason of specified perils to which the property may be exposed." *Johannes v. Phenix Ins. Co.*, 66 Wis. 50.

³ *Com. v. Wetherbee*, 105 Mass. 149, 160; *Rensenhous v. Seeley*, 72 Mich. 603, 40 N. W. 765.

Insurance in respect of life, "which is substantially the purchase by the insured from the insurer of a reversionary interest for a present sum of money, may be defined to be an agreement by the insurer to pay to the insured or his nominee a specified sum of money,

§ 8. Marine insurance is a contract of indemnity against the perils of the sea.^{3a}

§ 9. An accident insurance contract is one whereby one party, for a stipulated premium, undertakes to indemnify another against accidents and death caused by accidental means.⁴ As applied to injuries resulting in death, it is but a contract of life insurance limited to specified risks.⁵

either on the death of a designated life, or at the end of a certain period, provided the death does not occur before, in consideration of the present payment of a fixed amount, or of an annuity till the death occurs or the period of insurance is ended." *Biddle, Ins.* § 4; *Franklin Beneficial Ass'n v. Com.*, 10 Pa. St. 357.

"The contract of life insurance, or of insurance upon a life in the ordinary form, is a contract to pay a certain sum of money on the death of the insured. Another form, known as 'endowment insurance,' is a contract to pay a certain sum to the insured if he lives a certain length of time, or, if he dies before that time, to some other person indicated. In either of these forms the contract is, strictly speaking, an insurance on the life of the party, although the latter is generally denominated 'endowment' insurance." *State v. Federal Inv. Co.*, 48 Minn. 110; *Briggs v. McCullough*, 36 Cal. 542; *New York Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591. Life policy a valued one: *Bevin v. Connecticut Mut. Life Ins. Co.*, 23 Conn. 244; post, notes 9, 10.

A contract by an association to pay at certain fixed times definite sums of money as endowments to living members, or, in case of their death, to pay certain other sums to their beneficiaries, is life insurance as to both such sums. *Endowment and Benevolent Ass'n v. State*, 35 Kan. 253.

^{3a} 1 Duer, *Ins.* (ed. 1845), § 1.

"Marine insurance is that which is applied to maritime commerce, and is made for the protection of persons having an interest in ships or goods on board, from the loss or damage which may happen to them from the perils of the sea during a certain voyage or a fixed period of time." *Marshall, Ins.* § 2.

⁴ *Healey v. Mutual Acc. Ass'n*, 133 Ill. 556; *Employers' Liability Assur. Corp. v. Merrill*, 155 Mass. 404, 7 Am. Law Rev. 585; *Supreme Council v. Garrigus*, 104 Ind. 133; *North American L. & A. Ins. Co. v. Burroughs*, 69 Pa. St. 43; *Southard v. Railway Passenger's Assur. Co.*, 34 Conn. 574; *United States Mut. Acc. Ass'n v. Barry*, 131 U. S. 100; *State v. Fricke* (Wis.), 77 N. W. 734.

⁵ *State v. Federal Inv. Co.*, 48 Minn. 110.

§ 10. Casualty insurance is a species of accident insurance.⁶

§ 11. Guaranty insurance is a species of insurance whereby the insurer undertakes to indemnify the insured against loss or liability which he might incur in business transactions.⁷

⁶ *Employers' Liability Assur. Corp. v. Merrill*, 155 Mass. 404, 7 Am. Law Rev. 585; *State v. Federal Inv. Co.*, 48 Minn. 110.

⁷ This class of insurance is very comprehensive. It affords indemnity against dishonesty or insolvency of clerks or employes, losses in trade, or by breach of contract, or from liability as master or common carrier; guaranties the honesty and faithful discharge of duty of employes and persons holding positions of trust,—in short offers protection from any contingency or event not covered by the other kinds of insurance mentioned herein. *People v. Rose*, 174 Ill. 310, 44 L. R. A. 124 (guarantying fidelity of officer); *Shakman v. United States Credit System Co.*, 92 Wis. 366, 32 L. R. A. 383; *Smith v. National Credit Ins. Co.*, 65 Minn. 283, 33 L. R. A. 511 (credit insurance); *Trenton Passenger Ry. Co. v. Guarantors' Liability Ind. Co.*, 60 N. J. Law, 246, 44 L. R. A. 213 (indemnifying common carrier against loss from injuries to passengers); *State v. Hogan* (1899), 8 N. D. 301, 45 L. R. A. 166 (contract guarantying fixed revenue from lands); *Kansas City M. & B. R. Co. v. Southern News Co.*, 151 Mo. 373, 45 L. R. A. 380 (contract indemnifying a railway company against loss through injuries to employes of the News Company carried by the former); *Holmes v. Phenix Ins. Co.*, 98 Fed. 240, 47 L. R. A. 308 (protecting against loss by windstorms, cyclones, or tornadoes); "The Law of Liability Insurance," 6 American Lawyer, 247.

"Guaranty insurance is, in its practical sense, a guaranty or insurance against loss in case a person named shall make a designated default, or be guilty of specified conduct. It is usually against the misconduct or dishonesty of an employe or officer, though sometimes against the breach of a contract. This branch of insurance is * * * modern in origin and development. * * * It may be confidently stated, notwithstanding the comparative absence of specific decisions, that the general principles applicable to other classes of insurance are applicable here as well." 9 Am. & Eng. Enc. Law (1st ed.), 65; *People v. Fidelity & Casualty Co.*, 153 Ill. 25, 26 L. R. A. 295; *Embler v. Hartford Steam Boiler I. & Ins. Co.*, 158 N. Y. 431, 44 L. R. A. 512 (injury to employes); *Rumford Falls Paper Co. v. Fidelity & Casualty Co.*, 92 Me. 574; *Underwood Veneer Co. v. London Guarantee & Acc. Co.*, 100 Wis. 378, 75 N. W. 996; *Jaekel v. American Credit Ind. Co.*, 34 App. Div. (N. Y.) 565, 54 N. Y. Supp.

§ 12. In real estate and title insurance the insurer, for a consideration, obligates himself to guarantee and protect the title of another to specified real estate for a given time.⁸

SAME — BASIS OF CONTRACT.

§ 13. Indemnity and protection against loss are the fundamentals of an insurance contract.

Insurance is a means or system adopted to afford protection against the exigencies, dangers, and hazards of life and business. The very essence of any definition of insurance is indemnity for loss or pecuniary disadvantage in respect to a specified subject. Through fire insurance an insured is guaranteed against loss by fire to the extent agreed upon, but he is in no event to receive more than compensation for

505 (against loss by insolvency); *American Surety Co. v. Pauly*, 170 U. S. 133 (surety); *Sloman v. Mercantile Credit Guarantee Co.*, 112 Mich. 258, 70 N. W. 886 (insolvency); *George v. Goldsmiths & G. B. Ins. Ass'n*, (1898) 2 Q. B. 136, 67 Law J. Q. B. (N. S.) 807 (burglary); *Guarantee Co. v. Mechanics' Sav. Bank & T. Co.*, 80 Fed. 766, 82 Fed. 545 (fidelity); *Finlay v. Mexican Inv. Corp.*, 66 Law J. Q. B. (N. S.) 151 (guarantying payment of bond); *Talcott v. National Credit Ins. Co.*, 9 App. Div. (N. Y.) 433, 41 N. Y. Supp. 281 (against losses in business); *Tebbetts v. Mercantile Credit Guarantee Co.*, 73 Fed. 95 (against bad debts. Laws applicable to sureties do not apply to companies guarantying against bad debts).

⁸ *Stensgaard v. St. Paul Real Estate Title Ins. Co.*, 50 Minn. 429, 17 L. R. A. 575. "The insurer is not a surety. The defendant * * * agreed to 'indemnify, keep harmless, and insure * * * (the plaintiff) from all loss or damage not exceeding * * * the amount of his mortgage debt, which he or his assigns might sustain by reason of defects in the title to the mortgaged premises, or by reason of liens or incumbrances thereon existing at the date of the policy.' In a word, this is a guaranty that the mortgagee shall not suffer any loss or damage by reason of defects in the title or liens or incumbrances existing at the date of the policy. Under this guaranty if the mortgaged property, with a clear title and free from incumbrance, was worth the amount of the mortgage debt, the mortgagee could confidently rely upon the sufficiency of his security." *Minnesota Title Ins. & T. Co. v. Drexel* (C. C. A.), 70 Fed. 194.

an actual loss sustained, nor to profit by the occurrence of a fire. A person may effect an insurance upon his own life, or on the life of another in which he (the person insuring) has an insurable interest; but no insurance may be effected by any one on a life in which he has no pecuniary interest, or by way of gaming or wagering. And so with all other forms of insurance. There are, as we shall hereafter see, some apparent exceptions; but a close examination will show that the exceptions are few, and these more fanciful than real.⁹ "Wherever danger is apprehended or protection required, insurance holds out its fostering hand and promises indemnity. This principle underlies the contract, and it can never, without violence to its essence and spirit, be made by the assured a source of profit, its sole purpose being to guaranty against loss or damage."¹⁰

SAME — A PERSONAL CONTRACT.

§ 14. The contract of fire insurance is a personal contract, and does not run with the title to the property insured, except by virtue of special stipulations wholly foreign to itself, either interpolated in the contract or added thereto.

Policies are not insurances of the specific things mentioned to be insured, nor do they in case of fire insurance attach on

⁹ Post, c. 9, "Insurable Interest;" post, c. 16, "Proceeds."

¹⁰ *Wilson v. Hill*, 3 Metc. (Mass.) 66; *May, Ins.* §§ 2, 7; *Carpenter v. Providence Wash. Ins. Co.*, 16 Pet. (U. S.) 495. There is considerable doubt as to whether life and accident policies are, strictly speaking, contracts for indemnity only. *Joyce, Ins.* §§ 24-27; *Elliot, Ins.* § 11; *Phoenix Mut. L. Ins. Co. v. Bailey*, 13 Wall. (U. S.) 616, 2 Bigelow Cas. 765; *Dalby v. India & London Life Assur. Co.*, 15 C. B. 365, 2 Bigelow, 371; *McKenty v. Universal Life Ins. Co.*, 4 Bigelow, 153; *Ferguson v. Massachusetts Life Ins. Co.*, 102 N. Y. 647; *Mutual Life Ins. Co. v. Allen*, 138 Mass. 27; *Briggs v. McCullough*, 36 Cal. 542; *Bevin v. Connecticut Mut. Life Ins. Co.*, 23 Conn. 244; ante, note 3.

the realty, or in any way go with the same as incident thereto; but they are only special agreements with the persons insuring against such loss or damage as they may sustain. Policies are not in their nature assignable, nor is the interest in them before the accruing of liability ever intended to be transferable from one to another without the consent of the insurer. And in case of loss, settlement is to be made with the person insured, or in case of his death with his legal representatives. No others can avail themselves of the contract, even though they may have an equitable or legal interest in the property insured. The only exception to this rule exists where the policy has been *bona fide* and for a valuable consideration assigned with notice to the insurer and his consent either express or implied.¹¹ This rule applies particularly to the status and rights of an insured prior to the happening of the exigency insured against and the creation of a valid and enforceable claim against the insurer, (i. e. when a speculative or possible right to indemnity has grown into a debt or claim.) When this has come about, all rights and claims of an insured against his insurer are, at least in states where choses in action are assignable, transferable at the will of the insured. Special conditions in a policy prohibiting assignment of claims under it unless in writing indorsed thereon, and with the knowledge and consent of the insurer, are intended for the benefit of the latter alone.¹²

An apparent exception to the rule here laid down is found where the insurance has been taken out pursuant to an ex-

¹¹ Lindley v. Orr, 83 Ill. App. 70; Simeral v. Dubuque Mut. Fire Ins. Co., 18 Iowa, 319; Carpenter v. Providence Wash. Ins. Co., 16 Pet. (U. S.) 495; Carroll v. Boston Marine Ins. Co., 8 Mass. 515; Cummings v. Cheshire County M. F. Ins. Co., 55 N. H. 457; Carlson v. Presbyterian Board, 67 Minn. 436.

¹² Post, c. 16.

press agreement looking toward the protection of the realty; as for instance under a covenant by a mortgagor with a mortgagee to effect insurance and in case of loss apply the proceeds to the repair of the property;¹³ or where the law imposes upon the insured the duty of protecting the property for the benefit of another, as in case of a life tenant and a remainderman.¹⁴ But, as will be hereafter seen, these cases do not infringe upon the principles stated above. On the contrary, those principles are recognized as the basis upon which equity compels the application of the monies to proper purposes.

SAME — NATURE OF CONTRACT.

§ 15. The contract is

- (a) **Conditional;**
- (b) **Aleatory;**
- (c) **Executory.**

A contract of insurance is conditional in that, even though the terms be agreed upon or a policy written, it may not become effective, as where the subject matter has ceased to exist before the contract is completed;¹⁵ or the risk may never attach, as in the case of marine insurance where the contemplated voyage is never undertaken;¹⁶ or the contract may depend upon the performance by the insured of conditions precedent as the prepayment of the first premium, or his performance of conditions subsequent as the prompt payment

¹³ *Chipman v. Carroll*, 53 Kan. 163, 25 L. R. A. 305; *Ames v. Richardson*, 29 Minn. 330; *Wheeler v. Factors & Traders' Ins. Co.*, 101 U. S. 439.

¹⁴ *Sampson v. Bagley (R. I.)*, 44 L. R. A. 711. Compare *Harrison v. Pepper*, 166 Mass. 288, 33 L. R. A. 239.

¹⁵ Post, c. IV, notes 83, 84.

¹⁶ *Elliott, Ins.* § 12; *Arnould, Ins.* p. 10.

of subsequent annual premiums;¹⁷ or upon the property insured remaining in certain premises, or under certain conditions, or the life insured continuing to reside in certain territory, or the loss, death, or accident happening or being caused by the perils and hazards insured against.¹⁸

The contract is "aleatory" (from *alea*, a die), i. e. dependent upon chance and uncertainty. Each party assumes a certain risk. If no loss happens and the contingency insured against does not occur, the insured loses and the insurer gains the amount of the premium; if a loss occurs and the contingency insured against happens, the insurer loses and the insured gains an amount much larger than the premium.¹⁹

The contract is executory as to the insurer while it is obligated to fulfill its agreement upon the happening of the loss or event insured against; it is executed by the insured in so far as he has paid his premiums and performed the duties imposed upon him by the contract.²⁰

WHAT ARE INSURANCE CONTRACTS.

§ 16. All agreements whereby one undertakes to make compensation to another if he shall suffer loss of, or injury to, life or property, and which contain the essentials hereinafter mentioned, are contracts of insurance.²¹

Necessarily in defining insurance, or in attempting to state what agreements are properly classed as insurance contracts, in a single sentence, only the most general terms can

¹⁷ Post, c. 10, "Premiums;" New York Life Ins. Co. v. Statham, 93 U. S. 24.

¹⁸ Post, c. 12.

¹⁹ Emerigon, Ins. c. 1, § 3; Defrenois, Assurance sur la Vie, c. 3, § 79; May, Ins. § 5; Joyce, Ins. § 20.

²⁰ New York Life Ins. Co. v. Statham, 93 U. S. 24; Cohen v. New York Mut. Life Ins. Co., 50 N. Y. 619.

²¹ Cases supra. And see State v. Fricke, 102 Wis. 117, 77 N. W. 734. As to what are "insurance companies" within the meaning of

be used; and any general definition or statement must be extended to cover the ever changing phases in which the subject is presented to the public. Originally applied and used only to furnish protection and indemnity against loss of life and the perils and hazards of the sea, the system of insurance has grown until it now invades almost every department of business, commercial, and even private, life and enterprise. Its application and usage in the seven classes already mentioned are so well known and thoroughly understood as to need no elaboration. The question remains whether agreements which lack none of the imperative essentials of insurance contracts hereinafter mentioned are of such a scope and nature as to be termed insurance contracts, and come within the purview of the laws governing the same.

A contract by which one party for a consideration agrees to pay the other a sum of money upon the destruction or injury of something in which the latter has an insurable interest, is a contract of insurance, no matter what the terms or mode of payment of the consideration may be, or the mode of ascertaining or securing the payment of the amount promised in case of loss;²² and an agreement to guarantee a fixed revenue per acre from farming lands, whereby the guarantor contracts for a specified consideration to pay such fixed amount per acre for the crop grown upon such lands irrespective of the crop value;²³ and a contract whereby a benefit is to accrue upon the death or physical disability of a person, which benefit is conditioned upon the collection of an assess-

statutes, see *Penn Mut. Life Ins. Co. v. Mechanics' Sav. Bank & Trust Co.*, 37 U. S. App. 692, 43 U. S. App. 75, 38 L. R. A. 33.

²² *State v. Vigilant Ins. Co.*, 30 Kan. 585; *State v. Farmers' & M. Mut. Ben. Ass'n*, 18 Neb. 276; *Endowment & Ben. Ass'n v. State*, 35 Kan. 253; *Golden Rule v. People*, 118 Ill. 492.

²³ *State v. Hogan*, 8 N. D. 301, 78 N. W. 1051, 45 L. R. A. 166.

ment upon persons holding similar contracts;²⁴ and a contract under which a person receives at once a specified amount to be repaid in fixed monthly instalments unless death intervenes before full payment is made, in which event the debt is discharged;²⁵ and a contract to make good any loss by burglary up to a certain date in consideration of monthly payments;²⁶ and a bond by a guarantee company securing a bank against pecuniary loss on account of the fraudulent acts of a cashier or teller;²⁷ and a guarantee of the fidelity of officers and the performance of contracts;²⁸ and a contract to indemnify a merchant against loss from the insolvency of customers;²⁹ and a guarantee against business losses and uncollectible debts;³⁰ and a guarantee against misconduct or dishonesty of an employee or officer, or against breach of contract;³¹ and a contract to indemnify a common carrier of passengers against losses occurring from injuries to passengers carried by it;³² and an undertaking for a consideration to purchase at a fixed price the accounts which during one year a certain business firm should have against ascertained insolvent debtors, or judgment debtors against whom execu-

²⁴ *Lubrano v. Imperial Council O. U. F.*, 20 R. I. 27, 38 L. R. A. 546.

²⁵ *United Security Life Ins. & Trust Co. v. Ritchey*, 187 Pa. St. 173. Compare *Missouri, K. & T. Trust Co. v. McLachlan*, 59 Minn. 468; post, note 37.

²⁶ *Wood v. Grose*, Rap. Jud. Que. 5 B. R. 116.

²⁷ *Mechanics' Sav. Bank & Trust Co. v. Guarantee Co.*, 68 Fed. 459.

²⁸ *People v. Rose*, 174 Ill. 310, 44 L. R. A. 124.

²⁹ *Shakman v. United States Credit System Co.*, 92 Wis. 366, 32 L. R. A. 383; *Robertson v. United States Credit System Co.*, 57 N. J. Law, 12.

³⁰ *Tebbetts v. Mercantile Credit Guarantee Co. (C. C. A.)*, 73 Fed. 95.

³¹ Ante, note 7.

³² *Trenton Passenger Ry. Co. v. Guarantors' Liability Ind. Co.*, 60 N. J. Law, 246, 44 L. R. A. 213.

tions should be returned unsatisfied;³³ and a promise of indemnity against wind storms, cyclones or tornadoes;³⁴ and a storage receipt under which the warehouseman for a consideration undertakes to indemnify the bailor against loss by fire.^{34a}

Contra: But a rule of a benevolent association that every member in good standing shall be entitled to a certain sum per week during his sickness does not constitute an insurance contract between the society and its members.³⁵ Nor is a contract between a railroad company and its employees by which the latter permit the company to create a fund out of their wages and its own contributions, from which fund sick and injured employees are provided with relief, a contract of insurance under the New Jersey insurance law, even though the company undertakes to manage the fund and furnish the agreed relief.³⁶ A contract between a corporation and its members whereby each member pays an admission fee and monthly dues, part of which goes into a reserve fund and part into a maturity fund, from which latter fund when it contains a certain sum, a fixed amount is paid to the oldest member in good standing, is not an insurance contract, since though the payments are contingent they are in no respect made as indemnity against loss of any kind nor are they dependent upon the duration of human life, or the happening of any casualty to the member, or any loss or damage whatever.³⁷ A written agreement between a firm of insurance brokers and certain property owners, whereby the brokers

³³ *Claffin v. United States Credit System Co.*, 165 Mass. 501, 43 N. E. 293.

³⁴ *Holmes v. Phenix Ins. Co. (C. C. A.)*, 98 Fed. 240, 47 L. R. A. 303.

^{34a} *Olson v. Brady*, 76 Minn. 8.

³⁵ *Irish Catholic Ben. Ass'n v. O'Shaughnessey*, 76 Ind. 191.

³⁶ *Beck v. Pennsylvania R. Co. (N. J.)*, 43 Atl. 908.

³⁷ *State v. Federal Inv. Co.*, 48 Minn. 110. See ante, note 25.

are authorized and agree, as agents of the owners, to obtain and pay the premiums for all fire insurance required by the latter for a given time at a specified rate, and containing provisions concerning (1) the property, and (2) the companies in which insurance shall be carried, and (3) as to the increase of hazards, but also stipulating that the brokers shall not be thereby constituted insurers or underwriters, is not a contract of insurance.³⁸

From what has already been said and an examination of the cases cited it will appear there are certain essential elements present in every agreement which comes within the class of agreements known as contracts of insurance.

ESSENTIALS OF CONTRACT.

§ 17. Any valid contract of insurance must describe —

- (a) **Two parties — the insurer and the insured;**
- (b) **A subject-matter;**
- (c) **A risk or contingency insured against;**
- (d) **The duration of the insurer's liability;**
- (e) **The consideration or premium;**
- (f) **The amount of the indemnity or the extent of the insurer's liability.**

To render a contract of insurance or a contract to insure binding and effectual there must be a subject matter to which the policy or the agreement is to attach; a risk or contingency insured against; two parties, the insurer and the insured; the amount of the indemnity and the duration of the risk must be definitely fixed; and the premium or consideration must be agreed upon or paid or exist as an enforceable claim against the insured. Upon these particulars there must be an agreement before a contract of insurance is formed; anything less would be insufficient and unenforceable after a loss.³⁹

³⁸ *Tanenbaum v. Rosenthal*, 44 App. Div. (N. Y.) 431, 60 N. Y. Supp. 1092.

³⁹ *Mattoon Mfg. Co. v. Oshkosh Mut. Fire Ins. Co.*, 69 Wis. 564, 35

FORM OF CONTRACT.

§ 18. The contract may be

- (a) Oral, or
- (b) Written, or
- (c) Partly oral and partly in writing.⁴⁰

N. W. 12; *Strohn v. Hartford Fire Ins. Co.*, 37 Wis. 625; *Tyler v. New Amsterdam Fire Ins. Co.*, 4 Rob. (N. Y.) 157; *Cleveland Oil & Paint Mfg. Co. v. Norwich Union Fire Ins. Co.*, 34 Oreg. 228, 55 Pac. 435; *Milwaukee Mechanics' Ins. Co. v. Graham*, 181 Ill. 158; *Mutual Life Ins. Co. v. Young*, 23 Wall. (U. S.) 85-108; *Piedmont & A. Life Ins. Co. v. Ewing*, 92 U. S. 377-382; *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 22 L. R. A. 768; *Winchell v. Iowa State Ins. Co.*, 103 Iowa, 189, 72 N. W. 503; post, c. III; *Insurance Co. of North America v. Bird*, 175 Ill. 42, 51 N. E. 686.

⁴⁰ Post, ch. III.

CHAPTER II.

THE PARTIES TO THE CONTRACT.

- § 19. Two Parties Necessary.
- 20. Who may be Insured.
- 21-23. Who may Insure.
- 24. — Failure to Comply with Statute.
- 25. — Vested Rights.
- 26. — Retaliatory Statutes.
- 27-28. — Corporate Powers—Ultra Vires Contracts.

TWO PARTIES NECESSARY.

§ 19. The consent of at least two parties, each of whom is in law capable of contracting in the premises, is essential to the making of a contract of insurance. These parties are called the insured and the insurer.

From the very nature of things there are at least two parties necessary to the making of any contract of insurance. A man cannot enter into any contract with himself. He cannot be both obligor and obligee. Nor can a man as agent of an insurance company contract with himself as an individual, unless the contract be approved by his principal with full knowledge of all the facts. And a contract made by one as agent of an insurer, with himself as agent of a property owner, for the insurance of the buildings of the latter by the former, is not binding on either principal unless ratified by both. A contrivance which reduces the two parties to one, and admits an agent representing antagonistic interests to make a bargain by himself is so far against the policy of the law that the contract is held to be void, unless the principals choose afterwards, and with knowledge of all the circum-

stances that affect their possessions and rights, to ratify the act of the agent.¹

The party promising and undertaking to furnish the indemnity, or to make payment upon the happening of the contingency, is called the insurer; the other party—the promisee—is termed the “insured” or the “assured.” For all practical purposes these terms may be considered as being synonymous. “There are undoubtedly instances where this distinction between the terms ‘assured’ and ‘insured’ is observed, though we do not find any judicial consideration of it. The application of either term to the party for whose benefit the insurance is effected, or to the party whose life is insured, has generally depended upon its collocation and context in the policy.”²

WHO MAY BE INSURED.

§ 20. Any person, or association of persons, or any corporation capable of contracting generally, may become a party to a contract of insurance.

“Any one *sui juris* and under no legal disability to contract in general may be insured.” The same is true of any copartnership, or corporation public or private which has an insurable interest in the subject matter of the insurance.³

Infants.

Life insurance in a solvent company at ordinary and reasonable rates for an amount reasonably commensurate with an

¹ Post, c. VIII, “Agents.”

² Connecticut Mut. Life Ins. Co. v. Luchs, 108 U. S. 498, 2 Sup. Ct. 951. See, also, Sanford v. Mechanics’ Mut. Fire Ins. Co., 12 Cush. (Mass.) 541; Cyrenius v. Mut. Life Ins. Co., 73 Hun (N. Y.), 365, 145 N. Y. 576; Carrington v. Commercial F. & M. Ins. Co., 1 Bosw. (N. Y.) 152. One whose life is insured by another is not a party to the contract. North American Life Ins. Co. v. Wilson, 111 Mass. 542; Lockwood v. Bishop, 51 How. Pr. (N. Y.) 221.

³ Biddle, Ins. § 14; Holbrook v. St. Paul F. & M. Ins. Co., 25 Minn. 229; People v. Liverpool, L. & G. Ins. Co., 2 Thomp. & C. (N. Y.) 268.

infant's estate or his financial ability to carry it is a provident, fair, and reasonable contract, and one which it is entirely proper for an insurance company to make with him, assuming that it practices no fraud or other unlawful means to procure it.⁴ But it has been held that an infant who had insured his stock of goods was not liable to the company upon his premium note, as for necessities, when the plea of infancy was made and proved; that the contract was manifestly for the benefit of the infant and therefore not void but only voidable at his election.⁵ It is submitted that the first rule is the better and more in accordance with the spirit and trend of modern judicial opinion. A rule of an insurance company not to insure the property of minors will not invalidate a policy issued to a minor, when the one procuring it has no notice of such rule.⁶ In New York it has been held that an assessment and co-operative life insurance company organized under the laws of that state cannot receive infants into its membership, because the powers conferred upon members cannot be exercised by children of tender years, and upon the further grounds that the plan of operation implies the voluntary association of persons capable of participating in the administration of corporate affairs, and that from a consideration of the statute and the nature and object of such organizations as well as the relation which members hold to the corporation, it is apparent that adult persons only were contemplated as entitled to membership.⁷ But in Illinois the holding is that the contract between a member and such

⁴ *Johnson v. Northwestern Mut. Life Ins. Co.*, 56 Minn. 365.

⁵ *Monaghan v. Agricultural Fire Ins. Co.*, 53 Mich. 238, 18 N. W. 799; *New Hampshire Mut. Fire Ins. Co. v. Noyes*, 32 N. H. 345.

⁶ *Johnson v. Scottish Union & Nat. Ins. Co.*, 93 Wis. 223, 67 N. W. 416.

⁷ *Re Globe Mut. Ben. Ass'n*, 135 N. Y. 280, 17 L. R. A. 547.

an association is unilateral and does not bind the former to the payment of any money or the performance of any condition; and hence that minors are not, merely because of their minority, disqualified from becoming members of mutual benefit societies in the absence of any specific statute on the subject; and their admission is not a violation of the policy of the law.⁸

Aliens.

An alien, who is not an alien enemy, has generally the same right and power to contract for insurance that a subject has. The subjects of two hostile states or countries cannot make a valid contract of insurance during the continuation of the war.⁹

WHO MAY INSURE.

§ 21. Except when prohibited by statute, individuals may act as insurers.

§ 22. There is no doubt as to the power of each state to say what corporations can do an insurance business within its territory and on what terms.

§ 23. The validity of statutes prohibiting individuals from assuming insurance risks is doubtful.

⁸ Chicago Mut. Life Ind. Ass'n v. Hunt, 127 Ill. 257, 2 L. R. A. 549.

⁹ Scholefield v. Eichelberger, 7 Pet. (U. S.) 586; Masterson v. Howard, 18 Wall. (U. S.) 99; Hepburn v. Dunlop, 1 Wheat. (U. S.) 179; Cross v. De Valle, 1 Wall. (U. S.) 1-16; Griswold v. Waddington, 16 Johns. (N. Y.) 438-451. As to effect of war in suspending contracts between citizens of hostile states, see Brandon v. Curling, 4 East, 410; Ex parte Boussmaker, 13 Ves. Jr. 71; Griswold v. Waddington, 16 Johns. (N. Y.) 438-451. For effect of Civil War, see Kershaw v. Kelsey, 100 Mass. 561; New York Life Ins. Co. v. Clopton, 7 Bush (Ky.), 179; Hamilton v. Mut. Life Ins. Co., 9 Blatchf. 234, Fed. Cas. No. 5,986. War as excuse for nonpayment of premiums: New York Life Ins. Co. v. Statham, 93 U. S. 24; Wheeler v. Connecticut Mut. Life Ins. Co., 82 N. Y. 543; Hillyard v. Mutual Ben. Life Ins. Co., 35 N. J. Law, 415; Dillard v. Manhattan Life Ins. Co., 44 Ga. 119.

General Rule.

The business of insuring and the issuing of contracts of insurance are principally carried on by corporations; but it is clear that, in the absence of any statutory restriction, they may be carried on by individuals. The business has been so generally monopolized by corporations that the right of unincorporated associations or individuals to insure has been but little questioned. In England a large share of underwriting was formerly carried on by a society of capitalists called "Lloyds"—each member subscribing his name to what policies he chose and setting opposite his name the amount of the risk he was willing to assume, and the premium being divided amongst the several subscribers in proportion to the amount of the liability assumed by each. This practice has never been much in vogue in America where the business is almost exclusively confined to stock companies and mutual companies and associations.

Statutory Control and Regulation.

It is probable that, at the date of this writing, every state in the Union has passed laws upon this subject, until it may be said that the right of state regulation of the business of insurance is universally recognized and upheld. Of the claim that it was a matter of interstate commerce the supreme court said: "Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties, which are completed by

their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until they are delivered. They are then local transactions and are governed by the local law.”¹⁰

Each state has the power to regulate and control the conduct of the insurance business within its own territory. It can say who can and who cannot engage in the business; and under what circumstances and conditions and restrictions it can be carried on by those who do engage in it. A grant of corporate existence is a grant of special privileges enabling the corporators to act for certain designated purposes as a single individual. Corporations are mere creatures of the statute, and the same power which authorizes their being and existence can properly say what franchises shall be available to them and on what terms and under what conditions and restrictions. Each state is clearly the master of its domestic corporations. And a corporation which is the mere creation of local law can have no legal existence beyond the limits of the local sovereignty where created. The recognition of its existence even by other states, and the enforcement of its contracts made therein, depends purely upon the comity of those states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having then no absolute right to recognition in other states, it follows that recognition may be granted a foreign corporation by other states upon such terms and conditions as they may think proper to impose.

A corporation is not a citizen of the United States within

¹⁰ Paul v. Virginia, 8 Wall. (U. S.) 168.

the meaning of the constitution. Each state has the power to exclude foreign corporations from her territory; and the power, if she allows them to enter her territory, to determine the conditions on which the entry shall be made; and therefore the power and right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business be carried on through officers or through ordinary agents; and she has the further power to prohibit her citizens from engaging in business with or contracting with a foreign corporation which has not complied with her laws; and in furtherance of these powers each state may enact and enforce all legislation in regard to things done within her territory which may be requisite to the efficacy and enforcement of such powers, subject always of course to the paramount authority of the constitutions of the state and the United States.¹¹

¹¹ State v. Phipps, 50 Kan. 609, 18 L. R. A. 657; Noble v. Mitchell, 100 Ala. 519, 25 L. R. A. 238; Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281; Schoolcraft's Adm'r v. Louisville & N. R. Co., 92 Ky. 233, 14 L. R. A. 579; State v. Stone, 25 L. R. A. 243, 118 Mo. 388; Com. v. Reinöhl, 163 Pa. St. 287, 25 L. R. A. 247; State v. Board of Ins. Comm'rs, 33 L. R. A. 288, 37 Fla. 564; Union Cent. Life Ins. Co. v. Pollard, 94 Va. 146, 36 L. R. A. 271; State v. Lancashire Fire Ins. Co., 66 Ark. 466, 45 L. R. A. 348; Aetna Ins. Co. v. Com. (Ky.), 45 L. R. A. 355; State v. Fireman's Fund Ins. Co., 152 Mo. 1, 45 L. R. A. 363. As to particular restrictions on foreign corporations, see State v. Ackerman, 51 Ohio St. 163, 24 L. R. A. 298, and notes thereto. People v. Fidelity & Casualty Co., 153 Ill. 25, 26 L. R. A. 295; Hooper v. California, 155 U. S. 648; see also, Daggs v. Orient Ins. Co. (Mo.), 6 Ins. Law J. (N. S.) 67; Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281; Parker v. Lamb, 99 Iowa, 265, 68 N. W. 686, 34 L. R. A. 704; Hoadley v. Purifoy, 107 Ala. 276, 30 L. R. A. 351; People v. Van Cleave, 183 Ill. 330, 47 L. R. A. 795; State v. Moore, 56 Neb. 82, 76 N. W. 474; Liverpool & L. & G. Ins. Co. v. Clunie, 88 Fed. 160; Jones v. German Ins. Co., 110 Iowa, 75, 46 L. R. A. 860; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 20 Sup. Ct. 518; State v. Johnson, 43 Minn. 350, post, note 41. As to

And courts cannot release foreign insurance companies from compliance with the conditions imposed by a state in granting them the right to do business within its borders, upon the ground that such conditions are onerous, discriminatory or inexpedient.¹² Thus it is within the power of a state to make a third person who shall in any manner, aid, or assist in transacting any business for an insurance company not organized under its laws an agent of said corporation and to provide that service of summons upon him in a civil action shall have the effect of service upon the corporation;¹³ and to prescribe the amount of capital required of a foreign corporation before allowing it to enter;¹⁴ and to require the deposit of a security fund within the state;¹⁵ and full and satisfactory information as to the business methods and financial con-

what are insurance companies under various statutes, see *State v. Nichols*, 78 Iowa, 747; *State v. National Acc. Soc. of N. Y.*, 103 Wis. 208, 79 N. W. 220; *Lubrano v. Imperial Council O. U. F.*, 20 R. I. 27, 38 L. R. A. 546; *Brown v. Balfour*, 46 Minn. 68, 12 L. R. A. 373; *State v. Miller*, 66 Iowa, 26; *Lee Mut. Fire Ins. Co. v. State*, 60 Miss. 395; *Sherman v. Com.*, 82 Ky. 102; *Conn. v. National Mut. Aid Ass'n*, 94 Pa. St. 481; *State v. National Ass'n*, 35 Kan. 51; *State v. Vigilant Ins. Co.*, 30 Kan. 585; *State v. Citizens' Ben. Ass'n*, 6 Mo. App. 163; *State v. Brawner*, 15 Mo. App. 597; *State v. Northwestern Mut. L. Stock Ass'n*, 16 Neb. 549; *State v. Farmers' & Mechanics' Mut. Benev. Ass'n*, 18 Neb. 276; *State v. Moore*, 38 Ohio St. 7; *Co-operative Fire Ins. Co. v. Lewis*, 12 Lea (Tenn.), 136; *Golden Rule v. People*, 118 Ill. 492. What are not: *Commercial League Ass'n v. People*, 90 Ill. 166; *State v. Iowa Mut. Aid Ass'n*, 59 Iowa, 125; *State v. Mutual Protective Ass'n*, 26 Ohio St. 19; *Supreme Council, O. C. F. v. Fairman*, 10 Abb. N. C. (N. Y.) 162.

¹² *Hartford Fire Ins. Co. v. Raymond*, 70 Mich. 485, 38 N. W. 474; *Manchester Fire Ins. Co. v. Herriott*, 91 Fed. 711.

¹³ *Fred Miller Brewing Co. v. Council Bluffs Ins. Co.*, 95 Iowa, 31, 63 N. W. 565.

¹⁴ *Parker v. Lamb*, 99 Iowa, 265, 68 N. W. 686, 34 L. R. A. 704.

¹⁵ *Attorney General v. North American Life Ins. Co.*, 82 N. Y. 172; *Employers' Liability Assur. Co. v. Commissioner of Ins.*, 64 Mich. 614, 31 N. W. 542.

dition of a company;¹⁶ and a license tax;¹⁷ and to prescribe the qualifications of agents;¹⁸ and to prohibit an agent acting for or soliciting for an unlicensed company.¹⁹ By analogy it would seem that a foreign insurance company can be compelled to pay a percentage of its premiums to a local corporation for the benefit of a firemen's relief fund.²⁰

An insurance commissioner in issuing permits to foreign corporations permitting them to do business in his state, acts in a ministerial capacity. His determination is not judicial or final and mandamus will lie to compel him to license a foreign company when it has complied with the requirements of the statutes in the matter.²¹ Nor can he arbitrarily revoke a license after one has been granted.²² A foreign corporation which has complied with the laws of a state, should not, as a matter of retaliation by force of a re-

¹⁶ *People v. State Ins. Co.*, 19 Mich. 392; *State v. Mathews*, 44 Mo. 523.

¹⁷ *City of Columbus v. Hartford Ins. Co.*, 25 Neb. 83, 41 N. W. 140; *Prince v. City of St. Paul*, 19 Minn. 267 (Gil. 226); *Moss v. City of St. Paul*, 21 Minn. 421; *State v. New England Mut. Ins. Co.*, 43 La. Ann. 133.

¹⁸ *Cases supra*; *Paul v. Virginia*, 8 Wall. (U. S.) 168; *State v. Johnson*, 43 Minn. 350; *Hooper v. California*, 155 U. S. 648. Compare *Allgeyer v. Louisiana*, 165 U. S. 578; *List v. Com.*, 118 Pa. St. 322.

¹⁹ *Com. v. Nutting*, 175 Mass. 154, 55 N. E. 895; *State v. Johnson*, 43 Minn. 350; *Allgeyer v. Louisiana*, 165 U. S. 578.

²⁰ See *cases supra*; *Liverpool & L. & G. Ins. Co. v. Clunie*, 88 Fed. 160; *Trustees v. Rome*, 93 N. Y. 313; *Childs v. Firemen's Ins. Co.*, 66 Minn. 393, 69 N. W. 141.

²¹ *People v. Van Cleave*, 183 Ill. 330, 47 L. R. A. 795 (in this case it was held that the license could not be refused because of the similarity of the name of a foreign company to that of a domestic one); *State v. Fidelity & Casualty Ins. Co.*, 39 Minn. 539. Compare *High Court of W. I. O. F. v. Commissioner of Ins.*, 98 Wis. 94, 73 N. W. 326.

²² *Metropolitan Life Ins. Co. v. McNall*, 26 Ins. Law J. 641, 81 Fed. 888.

taliatory statute, be excluded from doing business in such state upon the grounds that the laws of the state where the foreign corporation was created would exclude corporations of the other state, unless it is clearly apparent that such is the effect of the foreign law.²³

Validity of Statutes Prohibiting Individuals from Doing an Insurance Business.

In a single case the authority of the legislature to confine the insurance business to corporations has been sustained by a divided court. The dissenting opinion in which three judges concurred is so forcible and logical and the reasoning against the constitutionality of such a statute is so cogent, that the main decision carries little weight, except so far as it establishes a doubtful precedent on a new question.²⁴ However this may be there is no doubt of the invalidity of a statute discriminating in favor of the citizens of one state and against those of another state in regard to the privilege of carrying on the business.²⁵

SAME—FAILURE TO COMPLY WITH STATUTE.

§ 24. Contracts of insurance made by an insurer who has neglected to comply with the *lex loci contractus* are enforceable by the insured, but not by the insurer.

The well settled general rule is that when a statute prohibits or attaches a penalty to the doing of an act, the act is

²³ *State v. Fidelity & Casualty Ins. Co.*, 39 Minn. 539.

²⁴ *Com. v. Vrooman*, 164 Pa. St. 306, 25 L. R. A. 250; *State v. Stone*, 118 Mo. 388, 25 L. R. A. 243. Compare *Lamb v. Bowser*, 7 Biss. 315, Fed. Cas. No. 8,008; *Allgeyer v. Louisiana*, 165 U. S. 578; *State v. Scougal*, 3 S. D. 55, 15 L. R. A. 477; *Pennsylvania Fire Ins. Co. v. Moore*, 21 Tex. Civ. App. 528, 51 S. W. 878; *Imperial Shale Brick Co. v. Jewett*, 42 App. Div. (N. Y.) 588, 60 N. Y. Supp. 35.

²⁵ *Hoadley v. Purifoy*, 107 Ala. 276, 30 L. R. A. 351; *State v. Stone*, 118 Mo. 388, 25 L. R. A. 243. See notes to *Schoolcraft's Adm'r v. Louisville & N. R. Co.*, 92 Ky. 233, 14 L. R. A. 579.

void, and will not be enforced, nor will the law aid one to recover money or property which he has expended in the unlawful execution of it. But notwithstanding this general rule it does not follow when a statute attaches a penalty to the doing of an act that it always implies such a prohibition as will make the act void under all circumstances. The courts will look to the language of the statute, the subject matter of it, the wrong or evil which it is sought to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if from all these, it is manifest that it was not intended to imply a prohibition, or to render the prohibited act void, but simply to render it unenforceable by the one who has not complied with the statute, the courts will so hold.

The evident purpose of such statutes as we have considered is for the security of citizens doing business with insurance companies, and to place foreign corporations on the same plane as domestic corporations by making them amenable to local laws and subject to the jurisdiction and control of local courts. Whether a statute was meant merely to invalidate policies issued by companies in contravention of its provisions, or merely to provide that policies so issued should be unenforceable in so far as to deny to the insurer the right to enforce any contractual liability of the insured, or neither or both, is to be determined from a consideration of the statute as a whole. The ordinary purpose is the one above mentioned, viz. to protect policy holders and others dealing with insurance companies; and to this end it is usually made unlawful for companies to transact business, and for agents to act on behalf of such companies, until certain conditions have been complied with. These statutes do not usually impose on persons dealing with companies the duty and risk of ascertaining whether they have complied with the law and are entitled to do business in the state in which such dealings

take place. Even if a company has not become authorized to make a contract upon which a recovery is sought, it cannot set up its own default of duty to defeat an action by one who had innocently contracted with it. The right of an insured to recover does not depend upon the fact of the insurer having done its duty, and a complaint is not defective because it does not allege that fact.²⁶

In construing statutes which prohibit corporations doing business in a state before complying with prescribed conditions, a distinction is sometimes made between statutes which impose a penalty for violation of the law and those which do not impose any express penalty. Judge Elliott, in his recent work on Corporations, says: "The decisions are not uniform, but it seems that the weight of authority supports the proposition that, where a state prohibits a foreign corporation from doing business within its limits without having first complied with certain conditions, and imposes a penalty for the violation of the statute, the penalty is the sole means contemplated for compelling obedience and the contract is valid and enforceable. Where no penalty is provided it is generally held that such contracts are not enforceable, unless the conditions are such as to give rise to an estoppel."²⁷ The authorities on this question are reviewed at length by the supreme court

²⁶ *Seamans v. Knapp-Stout & Co.*, 89 Wis. 177, 27 L. R. A. 362; *Ganser v. Fireman's Fund Ins. Co.*, 34 Minn. 373; *Swan v. Watertown Fire Ins. Co.*, 96 Pa. St. 37; *Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co.*, 31 Mich. 346; *Germania Fire Ins. Co. v. Curran*, 8 Kan. 9; *Pennypacker v. Capital Ins. Co.*, 89 Iowa, 56, 8 L. R. A. 236; *Phenix Ins. Co. v. Pennsylvania R. Co.*, 134 Ind. 215, 20 L. R. A. 405; *Watertown Fire Ins. Co. v. Rust*, 141 Ill. 85; *Knights Templar & Masons' Life Indemnity Co. v. Berry*, 50 Fed. 511; *Seamans v. Christian Bros. Mill Co.*, 66 Minn. 205; *Fidelity & Casualty Co. of N. Y. v. Eickhoff*, 63 Minn. 170, 65 N. W. 351; *Randall v. Tuell*, 89 Me. 443, 38 L. R. A. 143.

²⁷ *Elliott, Corp.* (3d Ed.) §§ 269, 270.

of West Virginia²⁸ and the rule is stated as follows: "It is clearly not the primary purpose of the legislature in passing these laws to render the contracts and dealings of corporations which have not complied with these requirements, void and unenforceable. Hence * * * where the legislature has not expressly declared that this result shall follow from a failure to comply with the statute, the courts ought not to imply such a result unless this be necessary in order to attain the primary object for which the statute was enacted. Upon this ground it has been held that a contract made by a foreign corporation before it has complied with the statutory prerequisites to the right to do business will not, on that account, be held absolutely void, unless the statute expressly so declares; and if the statute imposes a penalty upon the corporation for failing to comply with such prerequisites, such penalty will be deemed exclusive of any others.²⁹ * * * The courts of Indiana, Illinois, Wisconsin and perhaps in some other states hold a different doctrine. In Vermont and Oregon, it has been held that a non-compliance with the precedent conditions of the statutes of those states by foreign corporations rendered their contracts void. But it will be observed that these statutes imposed no penalty for the failure to comply with their provisions; and it is principally upon this ground that the contracts are held void, because otherwise the statute might be evaded with impunity. Thus in *Bank v. Page*,³⁰ the court says: 'The general rule is that a contract in violation of law

²⁸ *Toledo Tie & Lumber Co. v. Thomas*, 33 W. Va. 566.

²⁹ *National Bank v. Matthews*, 98 U. S. 621; *Columbus Ins. Co. v. Walsh*, 18 Mo. 229; *Union Mut. Life Ins. Co. v. McMillen*, 24 Ohio St. 67; *Ehrman v. Teutonia Ins. Co.*, 1 McCrary, 123, 1 Fed. 471; *Clay F. & M. Ins. Co. v. Huron S. & L. Mfg. Co.*, 31 Mich. 346; *Hartford Live Stock Ins. Co. v. Matthews*, 102 Mass. 221; 2 Morawetz, *Priv. Corp.* § 665.

³⁰ 6 Or. 431-436.

is void. The only exception to the rule is that, when a law imposes a penalty for the prohibited act, and it clearly appears that the legislature intended no more than to impose the penalty for the violation of the law, a contract made in violation of the statute is not void.' It is evidently the want of such penalty in the statute that influenced the court to hold the contract void. And such seems to be the ground of the decisions in Indiana and other states."³¹

In Idaho it has been held that to the general rule that an act in violation of a statute forbidding it is void, there is an exception when the statute is for the protection of the public revenue, does not expressly make the act void, and the act is not *malum in se* nor detrimental to good morals.³²

Summary.

It is evident that much confusion exists both in the reports and in the text books as to the validity and effect of contracts made by corporations within a state wherein they were not authorized to do business because of a failure to comply with a statute forbidding them to transact business before conforming with certain requirements and conditions. It must be remembered that there are at least two parties to every contract, and that their rights in the matter of the enforcement of the contract may be different. A contract is frequently held binding on one party to it and voidable as to the other at his option, as in the case of the contracts of persons

³¹ *Walter A. Wood M. & R. Machine Co. v. Caldwell*, 54 Ind. 273; *Lester v. Howard Bank*, 33 Md. 558. The authorities on this question are reviewed in 2 *Morawetz, Priv. Corp.* §§ 662-666, and the author announces as his conclusion therefrom that, "unless it appear affirmatively that the legislature intended to render a forbidden act or contract absolutely void in legal contemplation, it will not be so held."

³² *Vermont Loan & Trust Co. v. Hoffman (Idaho)*, 37 L. R. A. 509, 49 Pac. 314.

under guardianship, or minors, or contracts procured by fraud or duress. Much of this confusion mentioned above has arisen from the failure to keep in mind that contracting parties have not always an equal right to the enforcement of a contract, and from the failure to distinguish between the right of a corporation to allege and stand upon its own default as a defense, and the right of the other party to set up such default of the corporation when the corporation itself seeks to enforce the contract.

A corporation will be estopped to assert its own wrong as a defense against its own contract, while that same wrong may be open to and constitute a complete defense to the other party when sued on the contract.

From what has been said and from an examination of the numerous and conflicting authorities on this question the following rules are deduced, viz.: As a general statement of law a contract founded on an act forbidden by statute is void. Whether a contract which violates the statute is only partially, or is wholly void, will depend upon the intention expressed in the particular statute. In construing such a statute courts will always look to the language of the statute, the subject matter of it, the nature and effect of the acts forbidden, the wrong or evil sought to be remedied, prevented or avoided, the purpose of the enactment of the statute, and the evident intention of the legislature as inferred from the wording of the statute considered in connection with these matters and in the light of the conditions existing or anticipated at the time of the passage of the act. The evident purpose of the passage of laws regulating insurance companies, whether domestic or foreign, is the protection of the public who transact business with such companies. That one doing business with such companies is entitled to rely on the presumption that the companies have complied with the laws, and are entitled

to exercise the rights they assume to exercise. That a corporation can only obtain a legal existence for business purposes within a state, or acquire contractual rights which the courts of a state will recognize, by complying with the laws of the state. That effect is best given to the purpose and intention of statutes prohibiting insurers from doing business within a state except upon certain prescribed conditions by holding, 1st, that an insurer cannot avail itself of any contract into which it has entered before it has complied with the statute; 2nd, that as against one who has innocently dealt with it, an insurer is estopped to assert its own neglect of duty and violation of law.

Illustrations: A bond insuring a foreign corporation against the dishonesty of its manager in Pennsylvania is void, and there can be no recovery thereon, where such corporation has not complied with the Pennsylvania statute requiring the filing of a statement and declaring that any person transacting business for such corporation without compliance with the statute, shall be guilty of a misdemeanor.³³ A foreign insurance corporation cannot claim the benefit of defenses open to companies qualified to do business in a state;³⁴ nor can it recover premiums on a contract insuring property within a state where it has not complied with the statutory requirements so as to be authorized to do business in that state;³⁵ but this failure to qualify does not relieve

³³ *McCanna v. Citizens' Trust & Surety Co.*, 76 Fed. 420, 35 L. R. A. 236; *Randall v. Tuell*, 89 Me. 443, 38 L. R. A. 143; *Edison General Electric Co. v. Canadian Pacific Nav. Co.*, 8 Wash. 370, 24 L. R. A. 315, and notes.

³⁴ *National Union v. Marlow*, 74 Fed. 775.

³⁵ *Gilbert v. State Ins. Co.*, 3 Kan. App. 1, 44 Pac. 442; *Buell v. Breese M. & G. Co.*, 65 Ill. App. 271; *Reliance Mut. Ins. Co. v. Sawyer*, 160 Mass. 413, 36 N. E. 59; *Seamans v. Christian Bros. Mill Co.*, 66 Minn. 205, 68 N. W. 1065; *Haverhill Ins. Co. v. Prescott*, 42

it of liability to the insured.³⁶ In Illinois under a statute "that it shall not be lawful for any agent or agents of any insurance company * * * to take risks or to do or transact any business of insurance in this state, without first producing a certificate of authority from the auditor of state," and imposing a penalty for a violation of its provisions; the supreme court held that a promissory note given to an insurance company was void and unenforceable, saying "when the legislature prohibits an act or declares that it shall be unlawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and, as one of the means of its prevention, that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void. To hold otherwise would be to give the person, or corporation, or individual, the same rights in enforcing prohibited acts as the good citizen who respects and conforms to the law. To permit such contracts to be enforced, if not offering a premium to violate the law, it certainly withdraws a large portion of the fear that deters men from defying the law. To do so, places the person who violates the law on an equal footing with those who strictly observe its requirements. That this contract is absolutely void as to appellee we entertain no doubt."³⁷ The same rule was applied in Wisconsin under a similar statute,³⁸ and in Michigan where the contract of insurance had been made

N. H. 547; *Langworthy v. Garding*, 74 Minn. 325, 77 N. W. 207; *Ford v. Buckeye State Ins. Co.*, 6 Bush (Ky.), 133. In Indiana the statute simply prohibits the enforcement of the contract until compliance. *Maine Guarantee Co. v. Cox*, 146 Ind. 107.

³⁶ Ante, note 26 et seq.

³⁷ *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85-91.

³⁸ *Aetna Ins. Co. v. Harvey*, 11 Wis. 394; *Charter Oak Life Ins. Co. v. Sawyer*, 44 Wis. 387; *Lycoming Fire Ins. Co. v. Wright*, 55 Vt. 526; *Buckley v. Humason*, 50 Minn. 195, 16 L. R. A. 423.

through the mails by a corporation of another state.³⁹ It has however been held that a corporation incorporated under the laws of Wisconsin may enter into a valid contract of insurance with an insurance company of that state upon property situated within a state in which the insurance company is not authorized to do business. But in this case the two corporations were resident in the state of Wisconsin, the contract was made there, and the insurer was authorized to do business there. This being so there would seem to be no good reason why the courts of Wisconsin should not enforce the liability of the insured for his premiums even though the properties covered were situate in other states where the insurer had not qualified to do business.⁴⁰

SAME—VESTED RIGHTS.

§ 25. An insurer obtains no vested right to do business in a state by complying with the existing laws of that state.

A foreign insurance company does not acquire any vested rights by complying with the police regulations or comity laws of a state which cannot be affected by subsequent changes

³⁹ *Seamans v. Temple Co.*, 105 Mich. 400, 28 L. R. A. 430. The court said: "If it be conceded that the contract was made in Wisconsin, and that the premiums and loss, if any, are payable there, it is as much in contravention of the policy of this state as though it had been made and was to be performed here. It cannot be supposed that the statutes cited were intended merely to prevent the act of making the contract in this state. The object is to protect the citizens of this state against irresponsible companies, and to prevent insurance by unauthorized companies upon property in this state." See, also, *Hartford Fire Ins. Co. v. Raymond*, 70 Mich. 501; *Seamans v. Zimmerman*, 91 Iowa, 363, 59 N. W. 290; *Rose v. Kimberly & Clark Co.*, 89 Wis. 545, 27 L. R. A. 556.

⁴⁰ *Seamans v. Knapp-Stout & Co.*, 89 Wis. 171, 27 L. R. A. 362. See *Cone Export & Commission Co. v. Poole*, 41 S. C. 70, and notes to same in 24 L. R. A. 289. Compare *State Mut. Fire Ins. Ass'n v. Brinkley Stave & Heading Co.*, 61 Ark. 1, 29 L. R. A. 712.

in such regulations or laws. After compliance with the laws of a state insurance companies may enter the state and do business therein; but their right to remain depends upon their compliance with then existing and subsequently enacted laws; and they may be ousted of all rights, privileges, and franchises acquired by them if either the companies themselves or the agents through whom they do business violate the statutes or fail to comply with all their provisions.⁴¹ A statute shortening the time of an insurer's immunity from suit to forty instead of ninety days, but without extending the period of the statute of limitations, affects the remedy merely, and does not impair any contractual rights existing before the statute was changed.⁴²

SAME—RETALIATORY STATUTES.

§ 26. Retaliatory statutes are constitutional and enforceable.

The power of the state to distinguish between her own corporations and those of other states desirous of transacting business within her jurisdiction being clearly established, it belongs to the state to determine the nature and degree of discrimination, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union. A statute imposing on an insurance company of another state the same taxes, fines, and fees, and the same restrictions and conditions (if greater or more onerous than those imposed upon domestic corporations) which are imposed by the home state of the foreign corporation on similar cor-

⁴¹ *State v. Firemen's Fund Ins. Co.*, 152 Mo. 1, 45 L. R. A. 363; *Philadelphia Fire Ass'n v. New York*, 119 U. S. 110; *State v. Lancashire Fire Ins. Co.*, 66 Ark. 466, 45 L. R. A. 348; *Aetna Ins. Co. v. Com. (Ky.)*, 45 L. R. A. 355; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28.

⁴² *Jones v. German Ins. Co.*, 110 Iowa, 75, 46 L. R. A. 860.

porations of the first mentioned state are constitutional.⁴³ They are not void for uncertainty;⁴⁴ nor are they an unlawful delegation of legislative power;⁴⁵ and do not violate a constitutional provision requiring uniformity of taxation.⁴⁶ But such statutes must be confined to cases coming fairly within their terms, and will be applied only where it is clear that the foreign laws would operate under similar circumstances;⁴⁷ and when it appears that the state of the foreign corporation imposes greater burdens upon the corporations of the state whose law is to be enforced than the latter state itself does.⁴⁸ It is immaterial that the foreign state has never enforced such a law. The existence of the law is sufficient to warrant the passage of a retaliatory statute and its being called into operation.⁴⁹

What Constitutes "Doing Business."

A statute prohibiting any agent of a foreign insurance company from taking risks or transacting any insurance busi-

⁴³ Philadelphia Fire Ass'n v. New York, 119 U. S. 110.

⁴⁴ State v. Ins. Co. of North America, 115 Ind. 257.

⁴⁵ People v. Philadelphia Fire Ass'n, 92 N. Y. 311; Phoenix Ins. Co. v. Welch, 29 Kan. 672; contra, Clark v. Port of Mobile, 67 Ala. 217.

⁴⁶ Home Ins. Co. v. Swigert, 104 Ill. 653; Goldsmith v. Home Ins. Co., 62 Ga. 378; Blackmer v. Home Ins. Co., 115 Ind. 596; Haverhill Ins. Co. v. Prescott, 42 N. H. 547, 80 Am. Dec. 123.

⁴⁷ State v. Fidelity & Casualty Ins. Co., 39 Minn. 538; State v. Fidelity & Casualty Ins. Co., 49 Ohio St. 440, 16 L. R. A. 611; State v. Western Union Mut. Life Ins. Co., 47 Ohio St. 167, 8 L. R. A. 131; People v. Fidelity & Casualty Co., 153 Ill. 25, 26 L. R. A. 295.

⁴⁸ State v. Reimund, 45 Ohio St. 214.

⁴⁹ State v. Fidelity & Casualty Co., 77 Iowa, 648; Germania Ins. Co. v. Swigert, 128 Ill. 237, 4 L. R. A. 473. See, also, Talbott v. Fidelity & Casualty Co., 74 Md. 536, 13 L. R. A. 584; Griesa v. Massachusetts Ben. Ass'n, 133 N. Y. 619, 30 N. E. 1146; Ohio v. Moore, 39 Ohio St. 486; State v. Ackerman, 51 Ohio St. 163, 24 L. R. A. 298, and notes thereto; Cone Export & Commission Co. v. Poole, 41 S. C. 70, 24 L. R. A. 291, and notes.

ness within a state without first procuring a certificate of authority does not prohibit the transaction of business generally not in the line of the business of insurance, e. g. does not prohibit the taking of security for debts or the foreclosure of a mortgage given as security.⁵⁰ So a foreign insurance company may sue to collect a premium for insurance on property in the state although it is not entitled to do business in the state, where the contract for insurance was made in another state in which it was valid;⁵¹ and may send its manager into the state to select and appoint agents before complying with the statute.⁵² The adjustment of a loss on behalf of a foreign corporation which has not complied with the requirements of statute so that it can lawfully do business, is not a transaction of business within the meaning of that statute, and an agent is not liable to the penalties of the act for adjusting the loss;⁵³ and a contrary construction would render the act void.⁵⁴ A life insurance company which is merely collecting premiums and paying losses on old policies is still "doing business" within the meaning of statutes regulating foreign corporations;⁵⁵ and within the meaning of tax laws.⁵⁶ One who forwards an application for insurance to the office of a foreign corporation in another state, and re-

⁵⁰ *Boulware v. Davis*, 90 Ala. 207, 9 L. R. A. 601; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727; *Charter Oak Life Ins. Co. v. Sawyer*, 44 Wis. 387; *State Mut. Fire Ins. Ass'n v. Brinkley Stave & Heading Co.*, 61 Ark. 1, 29 L. R. A. 712.

⁵¹ *Connecticut River Mut. Fire Ins. Co. v. Way*, 62 N. H. 622.

⁵² *D. S. Morgan & Co. v. White*, 101 Ind. 413.

⁵³ *People v. Gilbert*, 44 Hun (N. Y.), 522.

⁵⁴ *French v. People*, 6 Colo. App. 311, 40 Pac. 463; *Cooper Mfg. Co. v. Ferguson*, 115 U. S. 727.

⁵⁵ *Price v. St. Louis Mut. Life Ins. Co.*, 3 Mo. App. 262.

⁵⁶ *Smith v. International Life Assur. Co.*, 35 How. Pr. (N. Y.) 126. See, also, *Williams v. Commercial Ins. Co.*, 75 Mo. 388; *Relfe v. Commercial Ins. Co.*, 5 Mo. App. 173.

ceives in return a policy which he delivers upon receipt of the premium, retaining a part of it as a commission, will be regarded as "aiding in transacting the insurance business" of the foreign corporation.⁵⁷ Sending an insurance policy from another state is not carrying on business in the state where the policy is received;⁵⁸ otherwise if the policies are sent to an agent in such state to be delivered by him upon receipt of the premium.⁵⁹ The mere taking of a single application for a policy and forwarding it to the office of an insurer in another state, whence, if the application be approved, a policy is mailed to the applicant, does not render one liable to the charge of having issued the policy or done an insurance business;⁶⁰ but the situation is different when the one forwarding the application collects the premium.⁶¹

SAME—CORPORATE POWERS—ULTRA VIRES CONTRACTS.

§ 27. An insurance corporation can accept only such risks as it is authorized to assume by its charter or by the act under which it is incorporated.

§ 28. When an insurance company assumes a risk which it is not authorized to assume the contract is ultra vires, and unenforceable as a contract; but the party repudiating such a contract as ultra vires may be compelled, in a proper action, to account for whatever consideration he may have received from the other party upon the faith of the contract.

⁵⁷ *Pierce v. People*, 106 Ill. 18. Compare *People v. People's Ins. Exchange*, 126 Ill. 466, 2 L. R. A. 340.

⁵⁸ *Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co.*, 41 Fed. 643; *State v. Williams*, 46 La. Ann. 922; *City of New Orleans v. Virginia F. & M. Ins. Co.*, 33 La. Ann. 10.

⁵⁹ *Berry v. Knights Templars' & Masons' Life Indemnity Co.*, 45 Fed. 439; ante, note 57.

⁶⁰ *Hyde v. Goodnow*, 3 N. Y. 266; *Hacheny v. Leary*, 12 Or. 40.

⁶¹ *Cases ante*, notes 57, 60. See, also, post, c. 8, "Agents;" *Jackson v. State*, 50 Ala. 141; *State v. Beazley*, 60 Mo. 220; *State v. United States Mut. Acc. Ass'n*, 67 Wis. 624, 31 N. W. 229; notes in

A corporation has no natural or inherent rights or capacities. Being a creature of the state, it possesses only such powers as the state has granted to it, and such additional or incidental powers as are necessary to its corporate existence and to the proper execution of the powers granted. When it assumes to do that which it has not been empowered by the state to do, either expressly or impliedly, its assumption of power is vain, the act is void, and the contract is *ultra vires*. Such a contract cannot be ratified because only those acts can be ratified which could have been lawfully done or authorized. "The reasons why a corporation is not liable upon a contract *ultra vires*, that is to say beyond the powers conferred upon it by the legislature, and varying from the object of its organization, are:

"(1) The interest of the public that the corporation shall not transcend the powers granted.

"(2) The interest of the stockholders that the capital shall not be subjected to the risks of enterprises not contemplated by the charter, and therefore not authorized by the stockholders in subscribing for stock.

"(3) The obligation of every one entering into a contract with a corporation to take notice of the legal limits of its powers."⁶²

There is however a distinction between the exercise by a corporation of a power not conferred upon it and therefore denied to it, of which those dealing with the corporation are

2 L. R. A. 340, 24 L. R. A. 295, 14 L. R. A. 529, 9 L. R. A. 601, 45 L. R. A. 538; *Lamb v. Bowser*, 7 Biss. 315, Fed. Cas. No. 8,008.

⁶² *Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371; *Gent v. Manufacturers' & Merchants' Mutual Ins. Co.*, 107 Ill. 652; *Luthe v. Farmers' Mut. Fire Ins. Co.*, 55 Wis. 543, 13 N. W. 490; *Relfe v. Rundle*, 103 U. S. 222; *Redpath v. Sun Mut. Ins. Co.*, 14 Low. Can. Jur. 90; *Davis v. Old Colony R. Co.*, 131 Mass. 258; post, note 75.

bound to take notice, and the abuse of a general power which has been conferred, or irregularities in the exercise of that power which are unknown to the other contracting party. To illustrate: an insurance company, which by its articles of incorporation was formed for the purpose of insuring property against fire, cannot insure live stock against death.⁶³ But one who is insured against "accident through any external means" by a corporation created originally only for the purpose of insuring travelers, but subsequently authorized by statute to extend its plan and do a general accident insurance business upon a majority vote of its stockholders accepting the additional power, is entitled to assume that the necessary steps have been taken to accept the power which the officers assume to have and which they exercised when they issued the contract in question. The making of the contract involved was a representation, as was its continuance in that line of business, that a meeting had been regularly held and that the majority of the stockholders had accepted the offered power necessary to make the contract, and the insurer is estopped to show the contrary.⁶⁴

Illustrations of Rule.

A statute empowering married women to insure their husbands' lives does not authorize an agreement whereby the members of a society composed of married women agree that in event of the death of the husband of either of them each will pay an assessment toward a fund to be paid to the widow.⁶⁵ A mutual life insurance company cannot lawfully

⁶³ Rochester Ins. Co. v. Martin, 13 Minn. 59; O'Neil v. Pleasant Prairie Mut. Fire Ins. Co., 71 Wis. 621, 38 N. W. 345.

⁶⁴ Miller v. American Mut. Acc. Ins. Co., 92 Tenn. 167, 20 L. R. A. 775.

⁶⁵ Bruner v. Thiesner, 12 Mo. App. 289.

contract to insure a particular person on a different plan or basis than other members, nor to insure one who is not a member.⁶⁶ If the articles of incorporation do not provide for the payment of policies except upon the death of the insured, the issuing of a policy payable upon the occurrence of total disability of the insured is unauthorized.⁶⁷ A mutual insurance company organized under a statute providing for the formation of corporations for the purpose of mutual insurance against loss or damage by fire, hail, lightning, or storms and prohibiting the insuring of any property other than detached dwellings and their contents, farm buildings, and their contents and live stock and hay or grain in the bin or stack, has no power or authority to insure the standing or growing grain of one of its members against losses by hail.⁶⁸ A mutual assessment life insurance company cannot legally contract to pay the accrued death losses of another company out of funds which it has collected from its own members;⁶⁹ nor bind itself by an agreement to issue to the members of a reinsured company a form of certificate which it cannot issue to its own members;⁷⁰ has no right to receive accessions to its funds from sources not authorized by its charter nor to adopt any other means or plans for making payment of its policies than those provided for in its charter;⁷¹ and when an insur-

⁶⁶ *Clevenger v. Mutual Life Ins. Co.*, 2 Dak. 114; *Alvord v. Barker*, 107 Iowa, 143, 77 N. W. 368; *Corey v. Sherman*, 96 Iowa, 114, 32 L. R. A. 490, 64 N. W. 828; *State v. Manufacturers' Mut. Fire Ass'n*, 29 Ohio Law J. 160, 24 L. R. A. 252. As to membership in mutuals, see note 32 L. R. A. 490.

⁶⁷ *Preferred Masonic Mut. Life Ins. Co. v. Giddings*, 112 Mich. 401, 70 N. W. 1026.

⁶⁸ *Delaware Farmers' Mut. Fire Ins. Co. v. Wagner*, 56 Minn. 240.

⁶⁹ *Twiss v. Guaranty Life Ass'n*, 87 Iowa, 733, 55 N. W. 8.

⁷⁰ *Deshong v. Iowa Life & Endowment Ass'n*, 92 Iowa, 163, 60 N. W. 505.

⁷¹ *Kennan v. Rundle*, 81 Wis. 212, 51 N. W. 426. See, also, *Grayson v. Willoughby*, 78 Iowa, 83, 4 L. R. A. 365.

ance company is created to give financial aid and benefit to the "widows, orphans and heirs or devisees of deceased members" it is *ultra vires* for it to contract for "endowment insurance" payable to a member on his arriving at a certain age.⁷² But a rule of an insurer not to issue policies on the property of minors does not affect the validity of a policy issued to a minor who had no knowledge of the rule;⁷³ and it is liable on a note given in compromise of a loss even though it had no authority to insure the risk.⁷⁴

Estoppel of Insurer to Plead Ultra Vires.

The best rule on this subject is that a contract made by a corporation beyond the scope of its powers, express or implied, cannot be enforced or rendered enforceable by the application of the doctrine of estoppel; but the courts, while refusing to maintain an action on the contract, will strive to do justice to the parties by permitting money parted with on the faith of the unlawful contract (if the contract be neither *malum prohibitum* or *malum in se*) to be recovered back, or compensation to be made for it; in other words, while it cannot be enforced as a contract, the one repudiating it may be compelled to account for whatever consideration he may have received on account of the contract.⁷⁵

⁷² Rockhold v. Canton Masonic Mut. Benev. Soc., 129 Ill. 440, 2 L. R. A. 420. A policy on the life of a person more than sixty years old, issued by a mutual life association which has no authority to insure the life of a person over sixty years old, is *ultra vires* and void. King v. Gleason, 6 Kan. App. 141, 51 Pac. 301.

⁷³ Johnson v. Scottish Union & Nat. Ins. Co., 93 Wis. 223, 67 N. W. 416.

⁷⁴ Farmers' Mut. Ins. Co. v. Meese, 49 Neb. 861, 69 N. W. 113.

⁷⁵ Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24; Luthe v. Farmers' Mut. Fire Ins. Co., 55 Wis. 543, 13 N. W. 490; Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S. 138; Twiss v. Guaranty Life Ass'n, 87 Iowa, 733, 55 N. W. 8;

The application of a rule of law is oftentimes more difficult than the determination of the rule itself. The question remains, what insurance contracts are so clearly *ultra vires* as to be governed by this rule. In connexion with what has been said about the limitations of the powers of insurers to accept risks, it must always be borne in mind that there is a clear distinction between the usurpation of a power which has not been conferred upon and is therefore denied to a corporation and therefore is clearly *ultra vires*, and irregularities in the use or execution of a power which is possessed, i. e. the difference between attempted use of a power it has not, and the abuse of a power it has. The first is *ultra vires*; the second is *intra vires*. To illustrate—if the statute under which an insurer is created confers upon it the power to insure the lives of persons between certain ages, or forbids it to insure the lives of persons under or over specified ages, it will not be competent for the insurer to make valid insurance upon any life in violation of the statute. And a contract insuring lives under or over the specified ages would be *ultra vires*, incapable of ratification, and beyond the reach of the doctrine of estoppel. And so if the restriction be contained in the articles of incorporation of the insurer, for they, with the statute, constitute its organic law. But where the limitation is contained only in the by-laws of the insurer, an insurance contrary to their provisions is not strictly speaking *ultra vires*, but only a violation of one of the rules adopted by the insurer for the exercise of its general powers, and these rules, being for the self-government and protection of the insurer, may be waived by it. And if the insurer with knowledge that an insured was received outside of the age limit

Greenville C. & W. Co. v. Planters' C. & W. Co., 70 Miss. 669; State v. Monitor Fire Ass'n, 42 Ohio St. 555; Taylor, Priv. Corp. § 279; post, "Reinsurance."

fixed by its by-laws but within the limit fixed by its articles of incorporation still retains the consideration, and makes no offer to cancel the contract, it will be estopped to set up the matter of age as a defense to a suit on the policy.⁷⁶ There are some cases to the contrary;⁷⁷ but it is submitted that they are either based upon a misconception of the doctrines of *ultra vires* and estoppel as applied to the insurance business, or are the results of an inclination to overlook the fundamental principles of law when their application would work apparent hardship in a particular case. That this motive influenced the decision in at least one case, is practically confessed in the opinion.⁷⁸ It will be observed that the rule adopted by the supreme court of the United States, and which is here advocated, reserves to the party who has parted with his money or property, the right to relief and just compensation in a proper action.

⁷⁶ *Morrison v. Wisconsin Odd Fellows' Mut. L. Ins. Co.*, 59 Wis. 162, 18 N. W. 13; *Wiberg v. Minnesota Scandinavian Relief Ass'n*, 73 Minn. 303; *Gray v. National Ben. Ass'n*, 111 Ind. 531; *McCoy v. Northwestern Mut. Relief Ass'n*, 92 Wis. 577, 66 N. W. 697; *Alvord v. Barker*, 107 Iowa, 143, 77 N. W. 868; *Corey v. Sherman*, 96 Iowa, 114, 32 L. R. A. 490; *State v. Manufacturers' Mut. Fire Ass'n*, 29 Ohio Law J. 160, 24 L. R. A. 252.

⁷⁷ *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11; *Matt v. Roman Catholic Mut. Protective Soc.*, 70 Iowa, 455.

⁷⁸ *Seymour v. Chicago Guaranty Fund Life Soc.*, 54 Minn. 147. In this case the court said: "The rule may not be strictly logical, but it prevents a great deal of injustice." See, also, *Webster v. Buffalo Ins. Co.*, 7 Fed. 399; *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180; *Walker v. Metropolitan Ins. Co.*, 56 Me. 371; *Putnam v. Home Ins. Co.*, 123 Mass. 324; *Love v. Clune*, 24 Colo. 237, 50 Pac. 34.

CHAPTER III.

THE CONTRACT—FORM.

§ 29. Oral Contract.

30-33. — Making and Enforcement.

34. The Binding Slip.

35. Merger of Oral Contract.

36-39. The Policy.

ORAL CONTRACT.

§ 29. In the absence of any statutory provision to the contrary, a parol contract to insure is valid.

At common law a promise for a valuable consideration to give temporary insurance or to make a policy of insurance *in futuro* which would relate back to the date of agreement was no more required to be in writing than a promise to execute and deliver a bond, or a bill of exchange or a promissory note. In the earlier decisions in the United States there seems to have been some doubt and contrariety of opinion; but whatever doubts may formerly have been entertained as to the validity of parol contracts of insurance made by insurance corporations authorized by their charters to make insurance by issuing policies, it is now settled that they are valid. It is equally well settled that parol contracts of such companies to effect an insurance by issuing policies are valid, and will be enforced by compelling specific performance by the company, or in an action for the breach of the agreement; in either of which a recovery for the loss of the property agreed to be insured may be awarded the plaintiff.¹ To

¹ *Ellis v. Albany City Fire Ins. Co.*, 50 N. Y. 402; *Franklin Fire Ins. Co. v. Colt*, 20 Wall. (U. S.) 560; *McCabe v. Aetna Ins. Co.*, 9 N. D. 19, 81 N. W. 427; *Newark Machine Co. v. Kenton Ins. Co.*, 50

make a binding verbal contract for insurance, there must be a meeting of minds between the parties upon all the essentials, so that it is then and there a contract complete in all its details; or if the delivery of a policy be contemplated, so as to leave nothing thereafter to be done but to execute and deliver it according to the oral agreement. There must be an application, though not necessarily in writing. The terms and the subject matter, the premium, the amount and duration of the risk, the perils or contingency to be insured against must all be determined. If the application be made to an agent representing several companies, the particular company or companies to carry the risk must be designated, with the amount each is to carry, and each must by its agent, or otherwise, agree to assume the liability upon the terms and conditions proposed or acceded to by the applicant. Until all this is done there can be no binding contract. The prepayment of the premium is not necessary if it be understood that credit is to be given, but a promise to pay is essential. The insurance does not attach until the contract has been consummated so that, if the consideration has not been paid, the insurer may maintain an action for it. As in other cases of oral contracts, the terms of the agreement and the assent of the parties to them may be inferred from their acts and the attending circumstances as well as by the words they have

Ohio St. 549, 22 L. R. A. 768; *Mathers v. Union Mut. Acc. Ass'n*, 78 Wis. 588, 11 L. R. A. 83; *Michigan Pipe Co. v. Michigan F. & M. Ins. Co.*, 92 Mich. 482, 20 L. R. A. 277; *Insurance Co. of North America v. Bird*, 175 Ill. 42, 51 N. E. 686; *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 49 Cent. Law J. 467; *Emery v. Boston Marine Ins. Co.*, 138 Mass. 398; *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574; *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.), 448; *Putnam v. Home Ins. Co.*, 123 Mass. 324; *Hicks v. British America Assur. Co.*, 162 N. Y. 284, 48 L. R. A. 424; *Cleveland Oil Co. v. Norwich Ins. Soc.*, 34 Or. 228.

employed.² This is true of mutual as well as of stock companies.³

1. Charter Provisions.

Provisions in the charter of an insurance company respecting the execution of policies should be considered as merely enabling in their character, and not as restrictive of the power to make contracts in any suitable and convenient mode not specifically prohibited. It has been held that a charter authorizing the president and directors of a company to make insurance against fire, and for that purpose to execute such "contracts, bargains, agreements, policies and other instruments" as may be necessary, and declaring that every such contract, bargain, agreement and policy shall be in writing

² Cases *supra*. And see *Taylor v. Phoenix Ins. Co.*, 47 Wis. 365, 2 N. W. 559, 3 N. W. 584; *King v. Cox*, 63 Ark. 204, 37 S. W. 877; *Sproul v. Western Assur. Co.*, 33 Or. 98, 54 Pac. 180; *Sater v. Henry County Farmers' Ins. Co.*, 92 Iowa, 579, 61 N. W. 209; *Home Ins. Co. v. Adler*, 71 Ala. 516; *Haskin v. Agricultural Fire Ins. Co.*, 78 Va. 700; *Equitable Life Assur. Soc. v. McElroy*, 49 U. S. App. 548, 83 Fed. 631; *Angell v. Hartford Fire Ins. Co.*, 59 N. Y. 171; *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.), 448; *Tyler v. New Amsterdam Fire Ins. Co.*, 4 Rob. (N. Y.) 151; *Emery v. Boston Marine Ins. Co.*, 133 Mass. 398; *Milwaukee Mechanics' Ins. Co. v. Graham*, 181 Ill. 158. In *Eames v. Home Ins. Co.*, 94 U. S. 629, it is said: "It is sufficient if one party proposes to be insured, and the other party agrees to insure, and the subject, the period, the amount, and the rate of insurance is ascertained or understood, and the premium paid if demanded. It will be presumed that they contemplate such form of policy containing such conditions and limitations as are usual in such cases, or have been used before between the parties." *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 55 N. E. 119; *Firemen's Ins. Co. v. Kuessner*, 164 Ill. 275; *Fidelity & C. Co. v. Ballard & B. Co.* (Ky.), 48 S. W. 1074; *Cooke v. Aetna Ins. Co.*, 7 Daly (N. Y.), 555. When risk begins, see post, note 56.

³ *Commercial Mut. M. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 318; *Van Loan v. Farmers' Mut. F. Ins. Ass'n*, 90 N. Y. 280; *Emery v. Boston Marine Ins. Co.*, 138 Mass. 398; *Davidson v. Old People's Mut. Ben. Soc.*, 39 Minn. 303.

or in print and under the seal of the corporation, and properly signed and attested, restricts the power of the company to make a valid and binding contract of insurance in any other manner.⁴ But such provisions refer only to executed contracts or policies of insurance, and do not interfere with the right of an authorized agent to make agreements and parol promises for the issuance of a policy, and as to the terms on which a policy should be issued, so that a court would compel the company to execute the contract specifically, or where a loss has occurred enter a decree directly for the amount of the insurance recoverable under the policy which the insurer ought to have executed. Unless prohibited by statute or other positive regulation there is no authority in courts to refuse to enforce any lawful agreement which parties have made, if sufficiently proved by oral testimony. The law distinguishes between the preliminary contract to make insurance or issue a policy, and the executed contract or policy.⁵

⁴ *Constant v. Allegheny Ins. Co.*, 3 Wall. Jr. 316, Fed. Cas. No. 3,136; *Lindauer v. Delaware Mut. S. Ins. Co.*, 13 Ark. 461.

⁵ *New England F. & M. Ins. Co. v. Robinson*, 25 Ind. 536; *Roger Williams Ins. Co. v. Carrington*, 43 Mich. 252; *Firemen's Ins. Co. v. Kuessner*, 164 Ill. 275; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; *Relief Ins. Co. v. Shaw*, 94 U. S. 574; *Franklin Fire Ins. Co. v. Taylor*, 52 Miss. 441; *London Life Ins. Co. v. Wright*, 5 Can. Sup. Ct. 466; *Security F. Ins. Co. v. Kentucky M. & F. Ins. Co.*, 7 Bush (Ky.), 81; *Baile v. St. Joseph F. & M. Ins. Co.*, 73 Mo. 371. Compare *Henning v. United States Ins. Co.*, 47 Mo. 425.

A by-law of a company which provides that, "in case of the absence, inability or death of the president, policies and other papers shall be signed by two directors," relates only to the formal execution of papers which require signing, and does not exclude the making of oral contracts of insurance by any officer who may have authority, or be held out as having authority, to make such contracts. *Emery v. Boston Marine Ins. Co.*, 138 Mass. 398; *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.), 454; *Commercial Mut. M. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 321; *Franklin Fire Ins. Co. v. Colt*, 20 Wall. (U. S.) 560; *Eames v. Home Ins. Co.*, 94 U. S. 621; *Walker v. Metro-*

2. Statutory Provisions.

It is fundamental that the courts of a state will not enforce any contract made in direct violation of the laws of that state and that a party cannot enforce in any court a contract positively forbidden by the *lex loci contractu*. So where the statute of a state provides that a contract of insurance must be in writing, a parol contract is not binding nor of any effect whatsoever;⁶ and any alterations of a policy must be in writing;⁷ and a parol agreement for renewal is void.⁸ Such statutes in their application to insurance contracts are analogous in their operation to the operation of the statute of frauds in its relation to other contracts. Delivery is not necessary, if in other respects the contract is consummated. If an informal written contract be relied upon it must be shown to contain all the essentials of the written contract and be definite and certain respecting them.⁹ But such statutes being in derogation of the common law which concedes to every one the right to make such contracts without the for-

politan Ins. Co., 56 Me. 371; *City of Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa, 276.

⁶ *Roberts v. Germania Fire Ins. Co.*, 71 Ga. 478; *Simonton v. Liverpool, L. & G. Ins. Co.*, 51 Ga. 76; *Clark v. Brand*, 62 Ga. 23; *Henning v. United States Ins. Co.*, 47 Mo. 425. Compare *Baile v. St. Joseph F. & M. Ins. Co.*, 73 Mo. 371. Stamp laws do not affect the validity of oral contracts. At most, they throw doubt upon the admissibility in evidence of written contracts not properly stamped. And state courts are not within the provisions of the Federal statute for raising revenue to meet war expenditures, that no instrument not stamped according to the requirements of that statute shall be received in evidence in any court. *Carpenter v. Snelling*, 97 Mass. 452; *Green v. Holway*, 101 Mass. 243; *Cooley, Const. Lim.* (6th Ed.) 592; *Wingert v. Zeigler*, 91 Md. 318, 51 L. R. A. 316; *Knox v. Rossi* (Nev.), 48 L. R. A. 305, notes, 57 Pac. 179, and notes in 46 L. R. A. 454.

⁷ *Simonton v. Liverpool, L. & G. Ins. Co.*, 51 Ga. 76.

⁸ *Roberts v. Germania Fire Ins. Co.*, 71 Ga. 478.

⁹ *Clark v. Brand*, 62 Ga. 23.

mality of the evidence of a writing, are strictly construed and their scope will not be enlarged by implication or intendment. Thus a statute which requires the conditions of insurance to be stated in the body of the policy and forbids the consideration of the application of the insured or the by-laws of the company as a part of the contract unless incorporated in full into the policy, is held to be for the benefit and protection of the insured, to apply only to written contracts of insurance, and not to prohibit or in any way affect oral insurances.¹⁰ A general statute requiring insurance contracts to be in writing is to be construed in connection with and is modified by a provision in another statute relating to corporations as a class, and giving to them the right to make oral contracts.¹¹ The fact that the legislature of a state has prescribed a standard policy to which all written contracts of insurance must conform, does not restrict the right of an insurer to agree to issue a policy and to orally insure property against damage by fire until such policy shall be executed and delivered; but the parties will be conclusively presumed to have contemplated the form of policy required by law, and the terms and conditions of such a policy will be applicable in case of fire and damage to the property insured before delivery of the policy.¹²

SAME — MAKING AND ENFORCEMENT.

§ 30. Any insurance agent authorized to solicit insurance, fix rates, execute and deliver policies and collect premiums

¹⁰ Relief Fire Ins. Co. v. Shaw, 94 U. S. 574; Commercial Mut. M. Ins. Co. v. Union Mut. Ins. Co., 19 How. (U. S.) 318; Franklin Fire Ins. Co. v. Colt, 20 Wall. (U. S.) 560.

¹¹ Baile v. St. Joseph F. & M. Ins. Co., 73 Mo. 371, distinguishing Henning v. United States Ins. Co., 47 Mo. 425, where the statute last referred to was overlooked.

¹² Hicks v. British American Assur. Co., 162 N. Y. 284, 48 L. R. A. 424. See Arrott v. Walker, 118 Pa. St. 249.

has power to make an oral contract for temporary new insurance and for a renewal of existing contracts.

§ 31. The contracting parties are presumed to contemplate the issuance of a policy with usual and customary conditions and stipulations.

§ 32. An oral contract to issue a policy will be enforced in equity.

§ 33. An agent who fails to insure or procure insurance according to his contract is liable to the promisee for all damages resulting through his breach of contract. In so far as he contracted to and had power to bind his principal, the latter is also bound to make good such damages.

What Agents can Make Oral Contracts of Insurance.

In order that an oral contract to protect the insured between the taking of the risk and the issuance of the policy be binding, it must be clearly established that it was made and that the agent who made it had power to bind the company insuring. If an agent is empowered to represent a fire insurance company to solicit insurance, to receive premiums and to issue and deliver policies all on its behalf, then he will, in favor of third persons dealing with him in good faith, have authority to bind that insurer by parol contracts for insurance as well as by the execution and delivery of policies; and if there be any restriction on his power in this respect, it will only affect those to whom notice of such restriction has been legally brought or given.¹³ It is within the power of such an agent to orally agree that existing insurance shall be kept alive, and that policies about to expire shall be renewed even without prepayment of the premiums.¹⁴ Such power is not vested in

¹³ Post, c. 8, "Agents;" *Parsons v. Queen Ins. Co.*, 29 Up. Can. C. P. 188; *Angell v. Hartford Fire Ins. Co.*, 59 N. Y. 171; *Patterson v. Benjamin Franklin Ins. Co.*, *81 Pa. St. 454; *Commercial Mut. M. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 318. This rule embraces statutory agencies. *Mathers v. Union Mut. Acc. Ass'n*, 78 Wis. 588, 11 L. R. A. 83.

¹⁴ *Van Loan v. Farmers' Mut. Fire Ins. Ass'n*, 90 N. Y. 280; *McCabe*

a soliciting agent authorized only to receive applications which he would forward to the company for its approval or rejection.¹⁵ One dealing with an agent will not be heard to assert in him power beyond the known limitations of his authority.¹⁶ The burden is on the party attempting to establish such a contract to establish it in all its necessary details by a preponderance of evidence.¹⁷

Not Within Statute of Frauds.

Such a contract is not within the statute of frauds when the insurance is to commence within the year, since the agreement depends on a contingency that may happen within that time, and may by its terms be fully performed and ended before the expiration of that time.¹⁸

Proof of Contract.

While an oral contract of insurance may be made and is enforceable, yet it will be presumed, from the custom of in-

v. Aetna Ins. Co., 9 N. D. 19, 81 N. W. 426; Cohen v. Continental Fire Ins. Co., 67 Tex. 325, 3 S. W. 296. This is held even though the agent be not specially authorized to bind his company by a parol agreement for renewal, McCabe v. Aetna Ins. Co., supra; or if he be only a statutory agent, McCabe v. Aetna Ins. Co., supra; Mathers v. Union Mut. Acc. Ass'n, 78 Wis. 588, 11 L. R. A. 83; or although it be stipulated on the face of the existing policy that it shall not be renewed in that manner. Cases supra; Cohen v. Continental Ins. Co., supra; Knickerbocker Life Ins. Co. v. Norton, 96 U. S. 234; Chicago Life Ins. Co. v. Warner, 80 Ill. 410; Helme v. Philadelphia Life Ins. Co., 61 Pa. St. 107; Bowman v. Agricultural Ins. Co., 59 N. Y. 521; Westchester Fire Ins. Co. v. Earle, 33 Mich. 143; Trustees of First Baptist Church v. Brooklyn Fire Ins. Co., 19 N. Y. 305; King v. Hekla Fire Ins. Co., 58 Wis. 508, 17 N. W. 297.

¹⁵ Morse v. St. Paul F. & M. Ins. Co., 21 Minn. 407. See Fidelity & C. Co. v. Ballard & B. Co. (Ky.), 48 S. W. 1074.

¹⁶ More v. N. Y. Bowery F. Ins. Co., 130 N. Y. 537.

¹⁷ McCabe v. Aetna Ins. Co., 9 N. D. 19, 81 N. W. 426; Dinning v. Phoenix Ins. Co., 68 Ill. 414.

¹⁸ Commercial Fire Ins. Co. v. Morris, 105 Ala. 298; King v. Cox,

insurance companies to contract by written policies, that negotiations were not intended to be final, and that there was no intention to complete the contract until the delivery of the policy. The proof that an oral contract of insurance was made must be full and clear. Not only must it appear that all the essentials, terms, conditions and stipulations were agreed upon, but it must be shown that it was the understanding and intention of the parties that there should be an oral contract which would for a specified, or reasonable time, or until the issuance of a policy, protect the insured, and this intent and understanding must be plainly inferable from the negotiations and surrounding circumstances.¹⁹ The promise by an agent of several insurance companies, upon the receipt of a premium, to issue a policy of insurance at a future day, and his statement that the property would be insured in the meantime, do not constitute an oral contract of insurance binding upon an insurer who afterwards assumes the risk, but are at most an oral contract of the agent on his own behalf.²⁰ If the evidence shows that the only form of contract contemplated by the parties was by a policy issued upon a written application, and there is no evidence of any inten-

63 Ark. 204, 37 S. W. 877; *Wiebeler v. Milwaukee Mechanics' Mut. Ins. Co.*, 30 Minn. 464; *Phoenix Ins. Co. v. Spiere*, 87 Ky. 286; *John R. Davis Lumber Co. v. Scottish U. & N. Ins. Co.*, 94 Wis. 472, 69 N. W. 156.

¹⁹ *Equitable Life Assur. Soc. v. McElroy*, 49 U. S. App. 548, 83 Fed. 631; *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594; *Delaware State F. & M. Ins. Co. v. Shaw*, 54 Md. 546; *Merchants' Mut. Ins. Co. v. Lyman*, 15 Wall. (U. S.) 664; *Myers v. Liverpool & L. & G. Ins. Co.*, 121 Mass. 338; *Heiman v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 153 (Gil. 127); *Sandford v. Trust Fire Ins. Co.*, 11 Paige (N. Y.), 547; *Wainer v. Milford Mut. Fire Ins. Co.*, 153 Mass. 335, 11 L. R. A. 598; *Haskin v. Agricultural Fire Ins. Co.*, 78 Va. 700.

²⁰ *Kleis v. Niagara Fire Ins. Co.*, 117 Mich. 469, 76 N. W. 155; *Michigan Pipe Co. v. Michigan F. & M. Ins. Co.*, 92 Mich. 482, 20 L. R. A. 277.

tion to make a contract in any other form, there can be no recovery upon the negotiations as an oral contract.²¹ An oral contract of insurance does not arise from negotiations between an applicant for insurance and an agent, where the applicant subsequently signs an application in which he agrees that the basis of the contract between him and the company should be the application and the premium paid by him, that the application should not be binding on the company and that the policy should not be in force until actually issued.²²

The Conditions of an Oral Contract.

Upon an oral contract of insurance, where nothing is said about conditions, if a policy is to be issued, the parties are presumed to intend that it shall contain the conditions usually inserted in policies of insurance in like cases. And these same conditions will govern the rights of the parties if no policy be issued, as where a fire occurs immediately and before a policy could have been executed. The question is one of intent to be inferred from the circumstances surrounding the negotiations and the relations and previous dealings of the parties construed in the light of those negotiations. Thus proof of former insurance which has expired, or which it is intended to renew or replace, is proper, for the former insurance might form in part the basis of the negotiations which might seem to include without specific mention some of the essentials of the new contract. And in connexion with these, it is proper to receive evidence of the "understanding" of the

²¹ Markey v. Mutual Ben. Life Ins. Co., 118 Mass. 178.

²² Fowler v. Preferred Acc. Ins. Co., 100 Ga. 330, 27 Ins. Law J. 168, 28 S. E. 398; Easley v. New Zealand Ins. Co. (Idaho), 27 Ins. Law J. 289.

parties as to whether the contract was completed, and as to its terms.²³

A parol contract by a duly authorized agent to insure a dwelling-house in a certain sum, takes effect immediately although no time is mentioned.²⁴ And if it be understood by the parties that it shall continue in force for an indefinite period until there shall be some further communication between the parties regarding a written policy, it will continue in force in the absence of a notice by either to the other, even after lapse of the time reasonably necessary for the ascertainment of the facts required for the determination of the matter as to the written policy.²⁵ An oral agreement by an insurance agent upon application for insurance that in consideration of the necessary delay in procuring the policy, the insurance shall begin from the date of the application, is a valid contract upon which a recovery may be had in case of loss before the issuance of the policy, and is not a mere agreement for a contract;²⁶ and an agreement that the agent fix the amount of indemnity as he sees fit and proper, is binding upon the company where he does in fact fix it as shown by a memorandum made by him, and the fact that the assured understood that the term of insurance was one year while the

²³ *Ganser v. Fireman's Fund Ins. Co.*, 38 Minn. 74; *Home Ins. Co. v. Adler*, 71 Ala. 516; *Lipman v. Niagara Fire Ins. Co.*, 121 N. Y. 454, 8 L. R. A. 719; *Eames v. Home Ins. Co.*, 94 U. S. 629; *Karelsen v. Sun Fire Office*, 122 N. Y. 545; *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 22 L. R. A. 768; *Salisbury v. Hekla Fire Ins. Co.*, 32 Minn. 460; *Stehlich v. Milwaukee Mechanics' Ins. Co.*, 58 N. W. 379, 87 Wis. 322. So in a mutual company, *Van Loan v. Farmers' Mut. F. Ins. Ass'n*, 90 N. Y. 280. The conditions of an ordinary policy are not available to an insurer in an action for breach of contract when it denies the making of the contract. Post, note 40.

²⁴ *Potter v. Phoenix Ins. Co.*, 63 Fed. 382.

²⁵ *Baker v. Commercial Union Assur. Co.*, 162 Mass. 358.

²⁶ *Hardwick v. State Ins. Co.*, 20 Or. 547.

agent understood it to be three years, does not render the contract incomplete so as to prevent a recovery for loss occurring within the first year where the premium is to be the same in either case.²⁷ The rights of one whose property is destroyed after an oral contract to insure it but before a policy therefor is issued, are subject to the provisions of the standard policy prescribed by the law, and he can recover only by compliance with the conditions required by such a standard policy including that as to furnishing proofs within a specified time.²⁸ When a written contract is executed it supercedes all oral agreements previously had and made concerning matters governed by the written contract.²⁹

Specific Performance of an Oral Agreement to Issue a Policy.

It is well established law that upon proper proof that an oral contract has been made to do something, the consummation of which involves the execution of a written instrument which is afterwards refused to be made, a court of equity will compel the execution of the written contract which was agreed upon. But in any such case the proof must be clear, satisfactory and convincing. The burden rests upon the one asserting the right to the written contract to establish his claim, and to show that an agreement to execute the written contract was in fact entered into and that nothing essential to a complete agreement was left open to future determination. This agreement must be mutual and bilateral, capable of enforce-

²⁷ *Craft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 21 S. E. 854.

²⁸ *Hicks v. British American Assur. Co.*, 162 N. Y. 284, 48 L. R. A. 424; post, c. 13, "Notice and Proofs of Loss."

²⁹ *Union Mut. Life Ins. Co. v. Mowry*, 96 U. S. 544; *Merchants' Mut. Ins. Co. v. Lyman*, 15 Wall. (U. S.) 664; *Thompson v. Knickerbocker Life Ins. Co.*, 104 U. S. 252; *Nebraska & I. Ins. Co. v. Seivers*, 27 Neb. 541, 43 N. W. 351; *Fowler v. Metropolitan Life Ins. Co.*, 116 N. Y. 389; *Smith v. National Life Ins. Co.*, 103 Pa. St. 177; *Kleis v. Niagara Fire Ins. Co.*, 117 Mich. 469, 76 N. W. 155; post, § 35.

ment by either party, and so clear and specific in all material terms and details as to leave no reasonable doubt as to its meaning. These requirements being fulfilled a court of equity will coerce the execution of the written contract to which a suitor shows himself entitled. So a bill for the specific performance of an oral contract to issue a policy can be maintained; and a cause of action in equity for specific performance of a contract to issue a policy may be joined with a cause of action upon the agreement to insure and the policy as decreed by the court where a loss occurs before the issuance of the policy.³⁰

To entitle one to the specific performance of a verbal agreement to insure or to issue a policy, he must prove an oral contract possessing all the essentials of a written contract of insurance, viz.—the subject matter, the risk insured against, the amount of insurance, the rate of premium, the duration of the risks and the identity of the parties. The terms of the agreement and the understanding and intent of the parties may be inferred from the relations of the parties to each other, their previous business dealings, and all facts and circumstances attending the transaction. Where nothing is stipulated as to the terms or nature of the policy to be issued, the parties will be presumed to have contemplated the policy ordinarily issued by the insurer to cover such risks as the one in question. If no premium is agreed upon the ordinary rate

³⁰ *Idaho Forwarding Co. v. Fireman's Fund Ins. Co.*, 8 Utah, 41, 17 L. R. A. 586; *Hebert v. Mutual Life Ins. Co.*, 8 Sawy. 198, 12 Fed. 807; *Preferred Acc. Ins. Co. v. Stone*, 61 Kan. 48, 58 Pac. 986; *Dinning v. Phœnix Ins. Co.*, 68 Ill. 414; *Gerrish v. German Ins. Co.*, 55 N. H. 355; *Commercial Mut. M. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 318; *Phœnix Ins. Co. v. Ryland*, 69 Md. 437, 16 Atl. 109, 1 L. R. A. 548; *Campbell v. American Fire Ins. Co.*, 73 Wis. 100, 40 N. W. 661.

will govern.³¹ If the legislature has prescribed a form of policy to be issued, that will be the policy to which the insured is entitled, and his rights are subject to all its terms and conditions whether a loss occur before or after the policy be delivered.³² When the agent represents several insurance companies, the companies assuming the risks must be designated in some way, and the amount each is to carry.³³ The right of one to recover here depends upon the existence of insurance. There is another right arising from an unexecuted contract to insure, which will next be discussed.

Damages for Failure to Execute Agreement to Insure or Procure Insurance.

There is this difference between a contract of insurance *in praesenti* and a contract to hereafter insure, or procure insurance, viz.: the one is a completed contract of insurance, while the other is an unexecuted agreement to make a complete contract *in futuro*. In other words, as related to a loss and fire insurance in the present connexion, the first would be the basis of a claim for insurance on account of the loss; the second would be the basis for a claim that insurance had been promised but not furnished, thereby causing the property owner to lose the benefit of insurance for which he had contracted. An agreement to make a contract at a future day is not the equivalent of the one to be made, or of a present contract, though all the terms to be put in the latter are agreed upon. If one of the parties to the first agreement refuses to bind himself when the time comes, the court may, as we have just seen, compel a specific performance of it

³¹ Ante, notes 1, 2; *Home Ins. Co. v. Adler*, 71 Ala. 516, 77 Ala. 242.

³² *Hicks v. British American Assur. Co.*, 162 N. Y. 284, 48 L. R. A. 424.

³³ Notes *supra*.

if from the facts proven it would be equitable to do so; and if performance be decreed, a judgment may be entered in the same case for the amount found to be due the plaintiff on the contract, if any amount be then due him by its terms; or an action may be instituted on it if either party refuses to comply with it. But in an action upon a contract *in praesenti* the plaintiff must allege and prove a contract definite and completed upon the given date, for that is the very gist of his claim. Thus if A, being the authorized agent of an insurance company, agreed upon June 1st, 1900, to insure B for one year from and after that date against loss through fire, by a contract *in praesenti*, the insurer would be liable for a loss occurring upon June 2nd. And this would be so whether or not a policy were delivered before the fire. But if A only agreed to procure insurance for B, or to insure him as soon as he could execute and deliver a policy, the agreement would be promissory, and no insurance would be effected until the insurance had been procured and a policy executed. And so if in the first case A were the agent of several insurers, the contract would not be completed until the company assuming the risk had been selected.³⁴

Whether or not certain negotiations constitute a completed contract of insurance, or an agreement to insure in the future, or either, must be determined by the application of well known principles of the general law governing the making of contracts. If these negotiations constitute a contract the insured is thereby protected according to the terms of the contract; if they constitute only an agreement to procure insurance, or to insure in the future, and this agreement is not

³⁴ John R. Davis Lumber Co. v. Scottish U. & N. Ins. Co., 94 Wis. 472, 69 N. W. 156; Ellis v. Albany City Fire Ins. Co., 50 N. Y. 402; Idaho Forwarding Co. v. Fireman's Fund Ins. Co., 8 Utah, 41, 17 L. R. A. 586.

performed, the promisee has his remedy against the promisor for breach of the contract which was actually made. An agent of an insurance company who is held out by it as having authority to negotiate contracts of insurance for it can make a preliminary contract, (a) to issue a contract *in futuro*, or (b) to renew and keep alive existing contracts, binding upon his company; and for breach of such a contract to insure or renew the company will be liable upon the happening of the contingency or event to be insured against, to the same extent as if the insurance promised were in force.³⁵ But it must appear that the agent had authority to bind the company sought to be held;³⁶ and that all the terms of the contract were agreed upon, either expressly or impliedly, by and with the insurer in question.³⁷ In the case of an oral contract of insurance, when a loss occurs, the proper remedy of the insured is by an action upon the contract; in the case of an oral contract for insurance, when a loss occurs, the insured may usually sue either for damages for breach of the contract to insure, or he may ask for specific performance of the contract and then sue upon the policy. The amount of damages recoverable in both cases is the same, viz.: the amount of the loss to the extent of the insurance bargained for.³⁸ There is,

³⁵ McCabe v. Aetna Ins. Co., 9 N. D. 19, 81 N. W. 428; Sanford v. Orient Ins. Co., 174 Mass. 416, 49 Cent. Law J. 467. See ante, § 30, "Proof of Contract." Walker v. Farmers' Ins. Co., 51 Iowa, 680, 2 N. W. 583; Fish v. Cottenet, 44 N. Y. 538; Manchester v. Guardian Assur. Co., 151 N. Y. 88, 45 N. E. 381.

³⁶ Stewart v. Helvetia S. F. Ins. Co., 102 Cal. 218.

³⁷ Putnam v. Home Ins. Co., 123 Mass. 324; Myers v. Liverpool & L. & G. Ins. Co., 121 Mass. 338; Sargent v. National Fire Ins. Co., 86 N. Y. 626; O'Reilly v. London Assur. Corp., 101 N. Y. 575; Newark Machine Co. v. Kenton Ins. Co., 50 Ohio St. 549, 22 L. R. A. 768.

³⁸ Campbell v. American Fire Ins. Co., 73 Wis. 100, 40 N. W. 661; Fidelity & C. Co. v. Ballard & B. Co. (Ky.), 48 S. W. 1074; Baile v. St. Joseph F. & M. Ins. Co., 73 Mo. 371.

however, a material difference in the form of these actions, and the rights and liabilities of the parties litigant are not the same in each. In an action for specific performance, and upon the policy, the plaintiff is bound by all the terms and conditions of the policy contemplated by the preliminary contract and decreed by the court, and he can only recover after complying with the conditions of such policy, e. g. including those as to furnishing proofs of loss within a specified time;³⁹ whereas in an action for breach of a contract to insure, it is no defense that the policy if issued would have contained a condition requiring proofs of loss.⁴⁰

As already seen, neither of these actions will lie against an insurer until a contract of one kind or the other is shown to have been made by it.⁴¹ The president of a bank, who is also agent for an insurance company, cannot bind the company by his undertaking on its behalf to issue a policy on the property of the bank; nor can the receiver of an insolvent bind a company he represents by undertaking to renew insurance of that company on property held by him in his official capacity;⁴² nor will an action lie against the agent of an insurance company on account of the breach of his contract with a property owner to keep the policies of the owner in that company continuously renewed and to keep all the property insured for a number of years in the same company, since the fulfillment of the contract might compel the agent to

³⁹ *Hicks v. British American Assur. Co.*, 162 N. Y. 284, 48 L. R. A. 424.

⁴⁰ *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 267; post, § 46; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390; *Campbell v. American Fire Ins. Co.*, 73 Wis. 100, 40 N. W. 661; *Nebraska & I. Ins. Co. v. Seivers*, 27 Neb. 541, 43 N. W. 351.

⁴¹ Ante, § 17.

⁴² Post, c. 8, "Agents."

assume improper risks and interfere with the discharge of his duty to the insurer.⁴³

Any person, whether an insurance agent or not, who undertakes to procure or place insurance upon specified property, is under obligation to act promptly and to select responsible companies. For breach of his undertaking, he becomes liable in case of a loss to indemnify the party who should have been insured to the extent of the insurance promised. If application for insurance be made to an agent who represents several companies, no company assumes any liability until it be selected as an insurer and the terms of the contract are agreed upon. But if such agent, when the application is made to him, agrees to insure the property from a given date and to issue a policy thereon, he thereby assumes the risk personally, and becomes liable, in case a loss occurs before a policy is executed, to pay as much of the loss as would have been covered by the policy, provided the same had been issued.⁴⁴

THE BINDING SLIP.

§ 34. A binding slip is an incomplete writing evidencing an insurance.

The term "binding slip," in insurance parlance, is used to describe an informal writing executed on behalf of an insurer to an applicant for insurance at the time the application is made as evidence of the fact that the application has been accepted with or without qualification or condition. It varies as to definiteness and detail. It usually contains a receipt for the premium, (if paid), and a further memorandum

⁴³ *Ramspeck v. Pattillo*, 104 Ga. 772, 42 L. R. A. 197.

⁴⁴ *Campbell v. American Fire Ins. Co.*, 73 Wis. 100, 40 N. W. 661; *Lindsay v. Pettigrew*, 5 S. D. 500, 59 N. W. 726; *Stadler v. Trever*, 86 Wis. 42, 56 N. W. 187; *post*, c. 8, notes 337, 338; *Minneapolis Threshing Machine Co. v. Darnall*, 13 S. D. 279, 83 N. W. 267.

sufficient to identify the parties, the subject matter, and the principal terms of the contract, together with a statement that it is binding upon the insurer issuing it from the date mentioned either for a given time, or until a policy be issued, or until the application be finally accepted or rejected. It is not a mere agreement to insure, but a present insurance. In so far as it is complete, definite, and certain, it constitutes the contract of the parties for the time being, and until it is superseded by a new contract, or the execution and delivery of a policy, or until it expires by the termination of the period during which it was to be in effect or by mutual consent. In so far as it is incomplete, indefinite, and uncertain, it must be construed with reference to the facts and circumstances surrounding its making, the situation of the subject matter, and the negotiations and relations of the parties. Though none of the conditions found in ordinary insurance policies be mentioned, the rights and liabilities of the parties are the same as though the binding slip had stated that the present insurance was under the terms contained in the policy regularly issued by the company, or the terms of a standard policy if one be prescribed. And the strict fulfillment of these conditions can be demanded of the insured by the insurer even though no policy be delivered.⁴⁵

⁴⁵ *Lipman v. Niagara Fire Ins. Co.*, 121 N. Y. 454, 8 L. R. A. 719; *Karlesen v. Sun Fire Office*, 122 N. Y. 545; *Hicks v. British America Assur. Co.*, 162 N. Y. 284, 48 L. R. A. 424; *Cole v. Union Cent. Life Ins. Co. (Wash.)*, 47 L. R. A. 204; *Scammell v. China Mut. Ins. Co.*, 164 Mass. 341; *Patterson v. Royal Ins. Co. 14 Grant's Ch. (Up. Can.)* 169; *Kennedy v. New York Life Ins. Co.*, 10 La. Ann. 809; *Shaw v. Republic Life Ins. Co.*, 67 Barb. (N. Y.) 586; *Barr v. Insurance Co. of North America*, 61 Ind. 488; *Scurry v. Cotton States Life Ins. Co.*, 51 Ga. 624; *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325; *Marks v. Hope Mut. Life Ins. Co.*, 117 Mass. 528; *Neville v. Merchants' & M. Mut. Ins. Co.*, 17 Ohio, 192; *Putnam v. Home Ins. Co.*, 123 Mass. 324. See ante, § 29, "Oral Contract."

MERGER OF ORAL CONTRACT.

§ 35. Preliminary arrangements are merged into a subsequently executed written contract.

All previous verbal agreements, and all informal or incomplete written agreements evidenced by binding slips, are merged into and superseded by a complete written contract of insurance subsequently made and accepted by the parties; and, in the absence of fraud or mistake, this will be conclusively presumed to contain the entire engagements of the parties with all the terms and conditions contemplated by them, and to express the full measure of the rights and liabilities of each.⁴⁶ This final written contract of insurance is called a policy.

THE POLICY.

§ 36. A policy is a written contract of insurance.

§ 37. Its essentials are those of an oral contract.

§ 38. The parties may agree upon and insert in a policy any stipulations or conditions which are not forbidden by either public policy or positive law.

§ 39. There are many different kinds of policies, as —

- (a) Wager policies, which are of a gambling nature and illegal;
- (b) Interest policies, which protect an insurable interest of the one insured;
- (c) Open policies, in which the amount of indemnity to be paid is not fixed till a loss occurs or the event insured against happens;
- (d) Valued policies, in which the amount to be paid in case of total loss is stipulated and fixed in advance. In this class life and accident policies are often included;
- (e) Running, blanket and floating policies, which are used when the subject matter and insurable insurable interest are variable and fluctuating;
- (f) Standard policies, which are prescribed by statutes in different states to insure a uniformity of contract within each jurisdiction.

⁴⁶ Ante, note 29.

General Statement.

When an insurer and an insured have reduced their contract of insurance to writing, that writing or written contract is called a policy of insurance, or simply a policy. The use of the term "policy" imports a written contract of insurance, and to say that one is protected by a policy means that he is a party insured, and holds a written contract of insurance to which that name is ordinarily given. It supersedes all preliminary negotiations concerning the risk which it covers, for they become, and are, merged into it. It is the usual evidence of a contract of insurance; but its execution is not necessary to enable the assured to maintain an action upon a contract of present insurance made by parol or by binding slip. If issued, it is the best evidence of what the contract was; and, unless fraud or mistake be proven, parol evidence will not be admissible to contradict it. But when no policy is issued, the contract may be proven by any competent evidence.⁴⁷

Terms and Conditions of Policy.

The parties can insert in the policy such terms and conditions and stipulations as they may agree upon, provided always that these must not be contrary to public policy or violative of the substantive law. Many states have undertaken to regulate the form and contents of the policy by statute. In case of conflict between the provisions of the policy and

⁴⁷ *Morrison v. Insurance Co. of North America*, 64 N. H. 137; *McCullough v. Eagle Ins. Co.*, 1 Pick. (Mass.) 278; *Kennebec Co. v. Augusta I. & B. Co.*, 6 Gray (Mass.), 204; *Sperry v. Springfield F. & M. Ins. Co.*, 26 Fed. 234; *Union Mut. Life Ins. Co. v. Mowry*, 96 U. S. 544; *Gerrish v. German Ins. Co.*, 55 N. H. 355. The policy does not necessarily contain the whole contract. A statute upon the subject is part of the contract. *Cayon v. Dwelling House Ins. Co.*, 68 Wis. 510; *Emery v. Piscataqua F. & M. Ins. Co.*, 52 Me. 322.

those of the statute, the former must give way to the latter.⁴⁸ The insurer is held to a knowledge of all the conditions of his policy, and the fact that he has neither seen it nor read it is immaterial unless caused by the fraud or fault of the insurer.⁴⁹ These questions are dealt with at greater length elsewhere.⁵⁰

The Contents of the Policy — Essentials.

We have already seen that certain terms must be agreed upon prior to the consummation of any contract of insurance, and that these are essentials of the contract.⁵¹ Though the form of the policy is immaterial, except where prescribed by statute, it usually contains a statement and description of these essentials, either in itself or by reference to the application or other papers, and in addition thereto certain conditions, stipulations, provisions, and oftentimes warranties, intended to regulate and fix the rights and liabilities of the parties *inter se* with greater definiteness and precision. Wherein a policy is lacking in a statement of the essentials it may sometimes be aided by extrinsic evidence provided the contract be complete within the rules before stated. Or if anything material or essential having been agreed upon is omitted or misstated through mutual mistake or inadvertence, a court of equity will, upon a proper showing, grant appropriate relief.⁵² But if the contract itself, taken as a whole, be incomplete and lacking in any one of these essentials, so

⁴⁸ *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 9 L. R. A. 48; *Jeffries v. Economical Mut. Life Ins. Co.*, 22 Wall. (U. S.) 47; *Oshkosh Gas Light Co. v. Germania Fire Ins. Co.*, 71 Wis. 454.

⁴⁹ *Wilkins v. State Ins. Co.*, 43 Minn. 177; *Cleaver v. Traders' Ins. Co.*, 71 Mich. 414; *Morrison v. North America Ins. Co.*, 69 Tex. 353.

⁵⁰ Post, "Conditions and Stipulations."

⁵¹ Ante, § 17.

⁵² Post, Reformation, Specific Performance; *Thompson v. Phenix Ins. Co.*, 136 U. S. 287.

that what is wanting cannot be supplied, or is not properly inferable, either from the writings of the parties, or their oral agreement, or from their negotiations considered and construed in the light of their previous dealings (if any), and their relations to the subject matter and the risk, and all surrounding facts and circumstances, or from all these taken together, then the lack is fatal and the contract is not binding nor enforceable.⁵³ It is not always necessary that the name of the insured be stated in the policy if his identity be sufficiently established;⁵⁴ or that the nature and extent of the interest be set out if it is not disputed.⁵⁵ If no time is specified in the contract, and the circumstances do not compel a contrary inference, the risk will be deemed to have commenced at the date of the contract.⁵⁶

Kinds of Policies.

A *Wager Policy* is one in which the insured has no insurable interest in the subject matter of the contract, but only an interest in its loss or destruction. Such policies are void as being purely speculative and gaming in their nature and against public policy.⁵⁷

⁵³ Ante, notes 1, 2, 30-33.

⁵⁴ *Weed v. London & L. Fire Ins. Co.*, 116 N. Y. 106; *Lee v. Massachusetts F. & M. Ins. Co.*, 6 Mass. 215; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527.

⁵⁵ *Thompson v. Phenix Ins. Co.*, 136 U. S. 287; *Van Natta v. Mutual Security Ins. Co.*, 2 Sandf. (N. Y.) 490; *Steel v. Phenix Ins. Co. (C. C. A.)*, 51 Fed. 715, 154 U. S. 518; *Baker v. State Ins. Co.*, 31 Or. 41, 48 Pac. 699, 27 Ins. Law J. 86 (faulty description).

⁵⁶ *Union Ins. Co. v. American Fire Ins. Co.*, 107 Cal. 327, 28 L. R. A. 692; *Philadelphia L. Ins. Co. v. American L. & H. Ins. Co.*, 23 Pa. St. 65; *Lee v. Massachusetts F. & M. Ins. Co.*, 6 Mass. 215; *Potter v. Phenix Ins. Co.*, 63 Fed. 382 (in oral contract it begins at once).

⁵⁷ *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457. As to what constitutes an insurable interest, see post, ch. IX.

An Interest Policy is one in which the insured has an actual, insurable interest in the subject matter, so that, but for the indemnity and compensation contracted for, he would be, or be liable to become, pecuniarily damaged by the happening of the contingency insured against.⁵⁸

An Open Policy is one in which the sum to be paid is not fixed absolutely, but is left open for determination by the parties when a loss occurs. This determination of the extent of the loss, and of the amount for which the insurer is liable, if at all, is called the adjustment of the loss. This form of policy is also used where the insurance is upon a class of property rather than specific articles, or where the risk changes as to location and quantity, or is variable;⁵⁹ or merchandise in store where the stock is fluctuating both in amount and value;⁶⁰ or a dwelling house where the insurance is for a fixed sum, and the obligation is to pay "all loss and damage" within the sum named.⁶¹

A Valued Policy is one in which the interest of the insured in the subject matter and the amount of indemnity which he is to receive in case of total loss, is agreed upon by the parties in advance and stipulated in the policy. In the case of an open policy the insured must prove his insurable interest and the value of the property, but under a valued policy the sum fixed is conclusive except in case of fraud or gross overvalu-

⁵⁸ *Sawyer v. Dodge County Mut. Ins. Co.*, 37 Wis. 539; *Williams v. Smith*, 2 Caines (N. Y.), 130.

⁵⁹ *Williams v. Continental Ins. Co.*, 24 Fed. 767; *Snowden v. Guion*, 101 N. Y. 458; *Snell v. Delaware Ins. Co.*, 4 Dall. 430, Fed. Cas. No. 13,137.

⁶⁰ *Strohn v. Hartford Fire Ins. Co.*, 37 Wis. 625; *May, Ins.* § 30; *Watson v. Swann*, 11 C. B. (N. S.) 756; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 541; *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405.

⁶¹ *Farmers' Ins. Co. v. Butler*, 38 Ohio St. 128.

ation.⁶² This valuation binds both parties and limits the right of recovery by the insured.⁶³ An excessive overvaluation is presumptive evidence of fraud. Where an owner of property about to be insured, knowingly, and with intent to deceive the insurer, overvalues such property, and the insurer relying upon his valuation enters into the contract, the contract is voidable by the insurer if it acts promptly upon its discovery of the fraud. If the knowledge does not come to it until after the loss, it may then take advantage of it.⁶⁴ If the statements of the insured in his application are made warranties his estimate of value must be fair and reasonable. A false warranty will be fatal;⁶⁵ otherwise with an honest expression of opinion which overvalues the property;⁶⁶ espe-

⁶² *Alsop v. Commercial Ins. Co.*, 1 Sumn. 451, Fed. Cas. No. 262; *Universal Mut. Fire Ins. Co. v. Weiss*, 106 Pa. St. 20; *Cushman v. Northwestern Ins. Co.*, 34 Me. 487; *Lycoming Ins. Co. v. Mitchell*, 48 Pa. St. 367; *Borden v. Hingham Mut. Fire Ins. Co.*, 18 Pick. (Mass.) 523; *Lewis v. Rucker*, 2 Burrows, 1171; *McKim v. Phoenix Ins. Co.*, 2 Wash. C. C. 94, Fed. Cas. No. 8,862. An open policy providing that the goods insured are "valued at as indorsed" means that the property is valued at the sum stated as its value, and not at the sum stated as the amount of insurance. The policy remains open if no valuation is indorsed. *Snowden v. Guion*, 101 N. Y. 458; *Chisholm v. National Capitol Life Ins. Co.*, 52 Mo. 215; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457; *Bevin v. Connecticut Mut. Life Ins. Co.*, 23 Conn. 244; *Briggs v. McCullough*, 36 Cal. 542.

⁶³ *Holmes v. Charlestown Mut. Fire Ins. Co.*, 10 Metc. (Mass.) 211; *Luce v. Dorchester Mut. Fire Ins. Co.*, 105 Mass. 297.

⁶⁴ *Nassauer v. Susquehanna Mut. Fire Ins. Co.*, 109 Pa. St. 507; *Whittle v. Farmville Ins. Co.*, 3 Hughes, 421, Fed. Cas. No. 17,603; *Hersey v. Merrimac Co. Mut. Fire Ins. Co.*, 27 N. H. 149; *Gerhauser v. North British & Mercantile Ins. Co.*, 7 Nev. 174; *Sturm v. Great Western Ins. Co.*, 40 How. Pr. (N. Y.) 423.

⁶⁵ *Sun Fire Office v. Wich*, 6 Colo. App. 103, 39 Pac. 587; *School Dist. No. 4 v. State Ins. Co.*, 61 Mo. App. 597; *Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300.

⁶⁶ *First Nat. Bank of Kansas City v. Hartford Fire Ins. Co.*, 95 U. S. 673.

cially where it has been examined and appraised by the agent of the insurer.⁶⁷ But a condition in the policy avoiding it for overvaluation includes any substantial overvaluation whether made in good or bad faith.⁶⁸

It is sometimes difficult to determine whether a policy be valued or open, or partly valued and partly open.⁶⁹

Running, Blanket and Floating policies are often issued to cover risks where the amount of insurance required varies from time to time, or where the location of the subject of the risk, or the identity of the subject itself, or the insurable interest of the insured therein is fluctuating, as in the case of factors and warehousemen.⁷⁰

The Standard Policy.

Very many states have passed laws prescribing the exact form of insurance policy to be used within their confines, and forbidding the use of any other form than the one prescribed. There is no question as to the validity and constitutionality of such regulation of the insurance business, at least so far as conducted by foreign corporations;⁷¹ but as to the power of a leg-

⁶⁷ Hubbard v. North British & Mercantile Ins. Co., 57 Mo. App. 1.

⁶⁸ Boutelle v. Westchester Fire Ins. Co., 51 Vt. 4; Lycoming Fire Ins. Co. v. Rubin, 79 Ill. 402; Sun Fire Office v. Wich, 6 Colo. App. 103, 39 Pac. 587; School Dist. No. 4 v. State Ins. Co., 61 Mo. App. 597.

⁶⁹ Cushman v. Northwestern Ins. Co., 34 Me. 487; Harris v. Eagle Fire Co., 5 Johns. (N. Y.) 368; Phoenix Ins. Co. v. McLoon, 100 Mass. 475; Post v. Hampshire Mut. Fire Ins. Co., 12 Metc. (Mass.) 555; Brown v. Quincy Mut. Fire Ins. Co., 105 Mass. 396; Lycoming Ins. Co. v. Mitchell, 48 Pa. St. 367; Riley v. Hartford Ins. Co., 2 Conn. 368; Snowden v. Guion, 101 N. Y. 458. Standard fire policies are usually valued. See post, "Valued Policy Law; Total Loss; Arbitration," 45 Cent. Law J. 373.

⁷⁰ Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527; Hoffman v. Aetna Fire Ins. Co., 32 N. Y. 405.

⁷¹ 53 Cent. Law J. 106; Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281; O'Neil v. American Fire Ins. Co., 166 Pa. St. 72, 26

islature to so restrict the right of the individual insurer there is much doubt.⁷² A legislature desiring to provide a uniform policy of fire insurance to be made and issued by all companies taking such risks, so that none other than the standard policy can be lawfully issued or delivered within the state, must itself provide definitely and clearly what the policy shall contain; so that the enactment is a law complete in all its terms and conditions at the time of its passage, and nothing must be left to the judgment or discretion of an appointee of the legislature; so that, in form and substance, it is a law in all its details *in praesenti*, but which may be left to take effect *in futuro*, if necessary, upon the ascertainment of any prescribed fact or event. So an act providing for a standard policy cannot constitutionally delegate to an insurance commissioner the preparation of the form of the policy without fixing its terms and conditions.⁷³ Standard policies are ostensibly intended to insure fair and honest dealings between insurer and insured and to protect the latter from the consequences of contracts which he might otherwise make. The beneficent results, however, are more fanciful than real, and certain it is that both parties have been deprived of mutual advantages by the abridgment of their natural rights to contract.

Statutory or standard policies are usually valued as to buildings. They do not present the alternative of wager

L. R. A. 715; *Anderson v. Manchester Fire Assur. Co.*, 59 Minn. 182, 28 L. R. A. 609; *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 31 L. R. A. 112; *Hicks v. British America Assur. Co.*, 162 N. Y. 284, 48 L. R. A. 424; *Business Men's League v. Waddill*, 143 Mo. 495, 40 L. R. A. 501.

⁷² Ante, c. 2, notes 24, 25.

⁷³ *Anderson v. Manchester Fire Assur. Co.*, 59 Minn. 182, 28 L. R. A. 609; *O'Neil v. American Fire Ins. Co.*, 166 Pa. St. 72, 26 L. R. A. 715; *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 31 L. R. A. 112.

policies to indemnity policies. It is true that, *prima facie*, they raise a conclusive presumption as to the value of the property insured. But the change is only one kind of indemnity policy to another from the optional open or valued policy to the compulsory valued policy. "It makes no contract for the parties. In this it permits absolute freedom. It leaves them to fix the valuation of the property upon such prudence and inquiry as they choose. It only ascribes estoppel after this is done; estoppel, it must be observed, to the acts of the parties, and only to their acts, in open and honest dealing. Its presumptions cannot be urged against fraud,"⁷⁴ and in some instances it permits the subsequent depreciation of the property to be shown.⁷⁵ All contracts are entered into in contemplation of the law of the place, which becomes part of each contract and prevails over conflicting or opposing terms of the contract.⁷⁶ The provisions of a standard policy issued under an unconstitutional statute will be construed as those of a voluntary contract of the parties, and not as the requirements of a valid statute which can be waived only in the prescribed manner.⁷⁷

⁷⁴ *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281. See 45 Cent. Law J. 373.

⁷⁵ Rev. St. Mo. c. 89, art. 4, § 5397.

⁷⁶ Ante, note 48; post, § 55.

⁷⁷ *Hicks v. British America Assur. Co.*, 162 N. Y. 284, 48 L. R. A. 424; *Griffith v. New York Life Ins. Co.*, 101 Cal. 627, 40 Am. St. Rep. 96. Compare *German Ins. Co. v. Eddy*, 36 Neb. 461, 19 L. R. A. 707; *Quinlan v. Providence W. Ins. Co.*, 133 N. Y. 365; *Harris v. Phoenix Ins. Co.*, 85 Iowa, 238, 52 N. W. 128. The provisions of the Wisconsin statute creating a standard policy do not apply to township mutual insurance companies. *Worachek v. New Denmark Mut. H. F. Ins. Co.*, 102 Wis. 88, 78 N. W. 165.

CHAPTER IV.

THE CONTRACT (*Continued*)—MAKING.

§ 40-46. Consummation of Contract.

47. — Delivery of Policy.

48. Duration of Contract.

49. Renewal of Contract.

50. Revival of Policy.

51-52. Application.

CONSUMMATION OF CONTRACT.

§ 40. An insurance contract is completed when the proposals of the one party have been unqualifiedly and unconditionally accepted by the other party, and the acceptance has been signified by some proper act.

§ 41. The essential elements of the contract must be agreed upon.

§ 42. An application for insurance alone is a mere offer to make a contract upon the terms specified, and forms no part of a contract until it has been unconditionally accepted.

§ 43. If negotiations are carried on by mail, the contract is complete when the offer of the one party has been unconditionally accepted by the other and a letter of acceptance has been duly mailed.

§ 44. Policies of insurance must be executed by duly authorized agents of the insurer. Provisions requiring them to be countersigned are not of the essence of the contract and may be waived.

45. Neither prepayment of the premium nor delivery of a policy are necessarily essential to the completion of the contract, unless made conditions precedent to its consummation by agreement of the contracting parties.

§ 43. Whether either or both are such conditions precedent may be either

(a) A question of law, or

(b) A question of fact, or

(c) A mixed question of law and fact, depending always on the circumstances of each case.

The answer to an inquiry as to whether or not certain negotiations and transactions between an applicant for insurance and an insurer looking towards the insuring of the former by the latter constitute a perfect or complete contract of insurance, involves no more than the application of the well known principles of law governing the completion and consummation of other contracts to the facts of the given case. To the making of any binding and enforceable contract there must be at least two parties capable in law of contracting in the premises. There must be a distinct proposition made by one party and an unconditional acceptance of it by the other. This offer and acceptance must be communicated in some proper manner so that there is a distinct meeting of the minds of the contracting parties, and the object which the contract proposes to effect must be legal. There must be a mutuality of obligation. The offer and acceptance and their communication may be expressed or implied, verbal or written, by acts or conduct, or writing, or words, or by all together, except in cases where special forms or requirements are demanded by the *lex loci contractus*.

Concerning a contract of insurance, we have seen that there are certain imperative essentials; that, subject to some few exceptions, the contract may be oral or in writing; that statutory regulations of the form and substance of the contract are valid; that the legislature of a state can restrict the making of such a contract within that state to corporations which have complied with certain prescribed requirements (at least as far as insuring corporations are concerned); and that only certain risks can be legally assumed by insurers.

Applying this, then, to the consummation of a contract of insurance, we find that, primarily, the establishment of the contract requires proof that its essential elements have been determined and agreed upon in legal form by two parties who

are authorized by the law of the place of the contract to undertake the obligations which they have assumed. Both parties must be bound—the one to insure, the other to pay the premium. All the necessary elements must be agreed upon, either expressly, or impliedly; and if anything is left open and undetermined so that the minds of the parties have not met upon any essential point, no contract exists, and there is no liability on the part of the insurer to pay the loss, nor on the part of the insured to pay the premium; as where the rate of premium is left undetermined, or the time when the policy will attach, or the apportionment of the risk has not been made, or the insured retains control over the premium note or any papers, the delivery of which is a condition precedent. And further, each party must have done all that was understood and agreed would be done before the risk would attach. When all this has been done, when all the essentials have been agreed upon, when the insurer has agreed to insure upon the exact terms proposed by the applicant, when nothing remains to be done by either as a condition precedent, then the contract is perfect and complete, and goes into effect immediately or at a stipulated date in the future. Until then it is only an executory agreement to make a contract. The relation of insurer and insured is established at the moment when the former has a cause of action against the latter for the initial premium, if this has not been paid, and when the latter is entitled to a delivery of his policy, if it has not been delivered.¹

¹ *Mattoon Mfg. Co. v. Oshkosh Mut. Fire Ins. Co.*, 69 Wis. 564, 35 N. W. 12; *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252; *Anderson v. Continental Ins. Co.*, 105 N. Y. 666, 106 N. Y. 661; *Ellis v. Albany City Fire Ins. Co.*, 50 N. Y. 402; *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325; *Baldwin v. Chouteau Ins. Co.*, 56 Mo. 151; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390; *Massasoit Steam Mills Co. v. Western Assur. Co.*, 125 Mass. 110; *Taylor v.*

It is competent for the parties to make an oral contract of insurance *in praesenti* to be followed by the execution and delivery of a policy into which all previous negotiations will be merged, and which, when executed and delivered, will be the best evidence of the contract; but in view of the general custom of issuing policies upon all risks assumed, the proof of an oral contract for insurance prior to the issuance of a policy must be clear. If there has been no payment of the premium, or delivery of the policy, the contract is *prima facie* incomplete; and one claiming under such a policy must show an understanding and agreement of the parties that it should become operative notwithstanding these facts.² Prepayment of the premium is not necessary, if the amount be fixed and credit be given by the insurer.³

State Ins. Co., 107 Iowa, 275, 77 N. W. 1032; Mathers v. Union Mut. Acc. Ass'n, 78 Wis. 588, 11 L. R. A. 83; Michigan Pipe Co. v. Michigan F. & M. Ins. Co., 92 Mich. 482, 20 L. R. A. 277; Johnson v. Connecticut Fire Ins. Co., 84 Ky. 470; Hamblet v. City Ins. Co., 36 Fed. 118; New York Life Ins. Co. v. Babcock, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88; Hebert v. Mutual Life Ins. Co., 12 Fed. 807; Diboll v. Aetna Life Ins. Co., 32 La. Ann. 179.

² Wainer v. Milford Mut. Fire Ins. Co., 153 Mass. 335, 11 L. R. A. 598; Myers v. Liverpool & L. & G. Ins. Co., 121 Mass. 338; Supreme Lodge of Protection v. Grace, 60 Tex. 569; Heiman v. Phoenix Mut. Life Ins. Co., 17 Minn. 153 (Gil. 127); Michigan Pipe Co. v. Michigan F. & M. Ins. Co., 92 Mich. 482, 20 L. R. A. 277; Hughes v. Mercantile Mut. Ins. Co., 55 N. Y. 265; Mattoon Mfg. Co. v. Oshkosh Mut. Fire Ins. Co., 69 Wis. 564, 35 N. W. 12; Travis v. Peabody Ins. Co., 28 W. Va. 583; Goddard v. Monitor Mut. Fire Ins. Co., 108 Mass. 57. Ante, p. 53.

³ See post, note 7, and c. X, "Premium."

Examples of incomplete contracts: People's Ins. Co. v. Paddon, 8 Ill. App. 447. Negotiations incomplete, Todd v. Piedmont & A. Life Ins. Co., 34 La. Ann. 63; Armstrong v. State Ins. Co., 61 Iowa, 212. Policy not delivered nor premium paid, Schaffer v. Mutual Fire Ins. Co., 89 Pa. St. 296; Wainer v. Milford Mut. Fire Ins. Co., 153 Mass. 335, 11 L. R. A. 598; St. Louis Mut. Life Ins. Co. v. Kennedy, 6 Bush (Ky.), 450; Myers v. Liverpool & L. & G. Ins. Co., 121 Mass. 338.

The Fixing of the Terms of the Contract.

There must be a meeting of the minds of the contracting parties and an agreement, either express or implied, between them as to all the essential elements of the contract. Not merely the verbal and written negotiations are to be considered, but also the relations of the parties to each other and to the subject matter, their previous business transactions, the established custom and usage of the place, and all surrounding facts and circumstances. Thus, where application for insurance upon merchandise in a storehouse is made to a company authorized to insure only against fire and marine risks, it can properly be inferred that the protection sought is against fire;⁴ and if the subject be an unfinished vessel and the hazard contemplated by fire alone, the contract must be regarded as one of fire insurance.⁵ It is sufficient if one party proposes to be insured, and the other party agrees to insure, and the essentials are ascertained or understood, and the premium paid if demanded. It will be presumed that they contemplate such form of policy with such conditions and limitations as are usual in such cases, or as have been used before between the parties.⁶ A contract is not incomplete merely because the premium has not been fixed nor paid, or the time

Insurance not apportioned, *Kimball v. Lion Ins. Co.*, 17 Fed. 625. Offer and acceptance not identical, *Stockton v. Firemen's Ins. Co.*, 33 La. Ann. 577. Mutual offer not accepted, *Alabama Gold Life Ins. Co. v. Mayes*, 61 Ala. 163. Mutual company application not accepted by proper officers, *Haden v. Farmers' & Mechanics' Fire Ass'n*, 80 Va. 683. Attempted contract by unauthorized agent, solicitor, *Hambleton v. Home Ins. Co.*, 6 Biss. 91, Fed. Cas. No. 5,972; *Morse v. St. Paul F. & M. Ins. Co.*, 21 Minn. 407.

⁴ *Baile v. St. Joseph F. & M. Ins. Co.*, 73 Mo. 371.

⁵ *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256.

⁶ *Eames v. Home Ins. Co.*, 94 U. S. 621; *Hebert v. Mutual Life Ins. Co.*, 8 Sawy. 198; 12 Fed. 897; *Hicks v. British America Assur. Co.*, 162 N. Y. 284, 48 L. R. A. 424.

for which the insurance is to run has not been expressly agreed upon where there is a well understood rate on that class of risks, and where the usual term is one year, and where an intention to give credit can be inferred. Where there have been previous relations between the parties an application is presumed to have been made with reference to such relations, and in the absence of an express contract or circumstances indicating a contrary intent, the parties will be held to have contemplated the issuance of the same contract as had been previously issued, for a similar amount and period, at the regular rate of premium, and that the usual course of business as to giving credit for the premium would still continue.⁷

The Effect of Making an Application.

The making of an application is not, strictly speaking, essential to the making of an insurance contract. The offer may come primarily from the insurer. If an application is made its form and substance are matters for the determination of the parties. In any event an application is a mere offer to make a contract. When the party to whom it is made signifies his acceptance of it to the proposer (and not before) the minds of the parties meet and the contract is made. This

⁷ *Michigan Pipe Co. v. Michigan F. & M. Ins. Co.*, 92 Mich. 482, 20 L. R. A. 277; *Boice v. Thames & M. Marine Ins. Co.*, 38 Hun (N. Y.), 246; *Milwaukee Mechanics' Ins. Co. v. Graham*, 181 Ill. 158; *Train v. Holland Purchase Ins. Co.*, 62 N. Y. 598; *Winne v. Niagara Fire Ins. Co.*, 91 N. Y. 185; *Michigan Pipe Co. v. North British & M. Ins. Co.*, 97 Mich. 493, 56 N. W. 849. In *Cooke v. Aetna Ins. Co.*, 7 Daly (N. Y.), 555, it was held that the contract in presenti might be complete although the rate of premium was to be established by the insurer after investigation, and that the insured could recover for a loss occurring before he was notified of the amount of the premium.

acceptance must be signified by some act;⁸ and must be by some one authorized to act on behalf of and bind the acceptor.⁹ Agents have only such powers as their principal gives to them or holds them out to possess. An agent authorized only to solicit insurance has no authority to bind his principal by contracting for insurance on its behalf.¹⁰ An application may be accepted conditionally, as where it stipulates that the contract shall be completed only by the delivery of a policy properly countersigned, in which event there is no contract unless the policy be countersigned and delivered;¹¹ or for a limited time, pending investigation, when the insurance will terminate at the expiration of the given period unless a policy issue;¹² or it may state in terms that no liability shall attach until the application is accepted and a policy delivered;¹³ or until approval by certain designated officers or agents of the insurer, in which case the insurer is not liable for a loss occurring before the stipulated approval has been given.¹⁴ Where a written application is made for insurance the contract is not, as a general rule, completed

⁸ *Allen v. Massachusetts Mut. Acc. Ass'n*, 167 Mass. 18, 44 N. E. 1053; *Covenant Mut. Ben. Ass'n v. Conway*, 10 Ill. App. 348; *Heiman v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 153 (Gil. 127).

⁹ Post, c. 8, "Agents."

¹⁰ *Morse v. St. Paul F. & M. Ins. Co.*, 21 Minn. 407; *Fleming v. Hartford Fire Ins. Co.*, 42 Wis. 616; *Rowland v. Springfield F. & M. Ins. Co.*, 18 Ill. App. 601.

¹¹ *McCully's Adm'r v. Phoenix Mut. Life Ins. Co.*, 18 W. Va. 782; *Noyes v. Phoenix Mut. Life Ins. Co.*, 1 Mo. App. 584.

¹² *Barr v. Insurance Co. of North America*, 61 Ind. 488.

¹³ *Chamberlain v. Prudential Ins. Co. (Wis.)*, 85 N. W. 128.

¹⁴ *Pickett v. German Fire Ins. Co.*, 39 Kan. 697; *Atkinson v. Hawkeye Ins. Co.*, 71 Iowa, 340, 32 N. W. 371; *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 42 L. R. A. 90; *Alabama Gold Life Ins. Co. v. Mayes*, 61 Ala. 163.

until the application has been forwarded to, approved and accepted by those who have power to issue the policy.¹⁵

The receipt of an application for insurance accompanied by a premium note at the home office of an insurer to which they have been forwarded by a soliciting agent does not make a contract of insurance. The delivery of the note and application is in the nature of a proposition for insurance which requires the assent of the insurer to constitute a contract. And mere delay in acting upon the application is not the equivalent of an acceptance;¹⁶ even though the agent has assured the applicant that the insurance was in effect from the signing of the application, since it is not the duty nor within the power of such an agent to construe the application and note nor to declare their legal effect.¹⁷ And an insurer upon

¹⁵ *Home Forum Ben. Order v. Jones*, 5 Okla. 598, 50 Pac. 165; *Armstrong v. State Ins. Co.*, 61 Iowa, 212.

¹⁶ *Connecticut Mut. Life Ins. Co. v. Rudolph*, 45 Tex. 454; *Misselhorn v. Mutual Reserve Fund Life Ass'n*, 30 Fed. 545; *Kohen v. Mutual Reserve Life Fund Ass'n*, 28 Fed. 705; *Haskin v. Agricultural Fire Ins. Co.*, 78 Va. 700; *New York Mut. Ins. Co. v. Johnson*, 23 Pa. St. 74; *Easley v. New Zealand Ins. Co. (Idaho)*, 27 Ins. Law J. 289; *Fowler v. Preferred Acc. Ins. Co.*, 100 Ga. 330, 27 Ins. Law J. 168, 28 S. E. 398; *More v. New York Bowery Fire Ins. Co.*, 130 N. Y. 537; *Royal Ins. Co. v. Beatty*, 119 Pa. St. 6; *Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 516; *Harp v. Grangers' Mut. Fire Ins. Co.*, 49 Md. 307; *Helman v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 153 (Gil. 127); *Alabama Gold Life Ins. Co. v. Mayes*, 61 Ala. 163; *Otterbein v. Iowa State Ins. Co.*, 57 Iowa, 274; *Covenant Mut. Ben. Ass'n v. Conway*, 10 Ill. App. 348.

¹⁷ *Dryer v. Security Fire Ins. Co.*, 94 Iowa, 471, 62 N. W. 799; *Winchell v. Iowa State Ins. Co.*, 103 Iowa, 189, 72 N. W. 504; *Fowler v. Preferred Acc. Ins. Co.*, 100 Ga. 330, 27 Ins. Law J. 168, 28 S. E. 398; *Easley v. New Zealand Ins. Co.*, 27 Ins. Law J. 289; *Fleming v. Hartford Fire Ins. Co.*, 42 Wis. 616. The company may under some circumstances be liable for the failure of an agent to seasonably forward an application. *Walker v. Farmers' Ins. Co.*, 51 Iowa, 680, 2 N. W. 583; *Fish v. Cottenet*, 44 N. Y. 538.

learning of a loss may reject an application which it had previously intended to accept where such intention has not been communicated to the applicant, and the application stipulates that its receipt and acceptance by the insurer must precede the consummation of the contract.¹⁸

It has been suggested that where the premium note is negotiable and the insurer upon receiving an application and note, remains silent, it may, under some circumstances, be held to have approved the application;¹⁹ but such a holding would amount to the courts making contracts for the parties instead of construing contracts which the parties have made for themselves. The applicant and insured are equally interested in making the contract and it is as much the duty of the latter to inquire whether his proposal had been accepted as it is the duty of the former to give the information.²⁰

Mutual Companies.

In determining whether one has been received into the membership of and insured by a mutual insurance company, much depends upon the provisions of its charter, constitution and by-laws. Where it is required, as a condition precedent, that parties seeking to become members shall sign an application which is to form the basis of the contract, a failure to sign the application is evidence that a contract has not been made.²¹ The charter provisions must be complied with. By-laws enacted for the use and benefit of the company may be waived by it. In case of conflict the former control.²² The

¹⁸ *Allen v. Massachusetts Mut. Acc. Ass'n*, 167 Mass. 18, 44 N. E. 1053.

¹⁹ *Atkinson v. Hawkeye Ins. Co.*, 71 Iowa, 340, 32 N. W. 371; *Preferred Acc. Ins. Co. v. Stone*, 61 Kan. 48, 58 Pac. 986.

²⁰ *Winchell v. Iowa State Ins. Co.*, 103 Iowa, 189, 72 N. W. 504.

²¹ *Supreme Lodge of Protection v. Grace*, 60 Tex. 569.

²² *Davidson v. Old People's Mut. Ben. Soc.*, 39 Minn. 303, 1 L. R. A. 482; ante, "Ultra Vires;" *Bishop v. Grand Lodge*, 43 Hun (N. Y.),

delivery of a certificate is not always essential^{22a} unless specifically required.²³

The Acceptance of the Offer and the Mutual Assent.

A contract is not complete until the offer of one party has been unqualifiedly and unconditionally accepted by the other. An application for insurance being a mere proposal may be withdrawn at any time before it is accepted, and the applicant is not bound to accept a policy subsequently tendered. If upon receipt of an application the insurer rejects it, or accepts it with qualification, or makes a counter proposition, there is no contract. The old application as qualified or the new offer is then for the consideration of the applicant. The parties must agree upon the same identical terms. Until then the mutual assent, the meeting of the minds of the parties, which are vital to the existence of the contract, and without which there can be no contract, are wanting. The obligation must be correlative. If there is none on the one side there is none on the other.²⁴ And this assent must be signified by

472; *Belleville Mut. Ins. Co. v. Van Winkle*, 12 N. J. Eq. 333; *Taylor v. Grand Lodge A. O. U. W.*, 29 N. Y. Supp. 773.

^{22a} *Lorscher v. Supreme Lodge K. H.*, 72 Mich. 316, 2 L. R. A. 206.

²³ *Home Forum Ben. Order v. Jones*, 5 Okla. 598, 50 Pac. 165. See, also, *Van Slyke v. Trempealeau County Farmers' Mut. Fire Ins. Co.*, 48 Wis. 683; *Connecticut Mut. Life Ins. Co. v. Rudolph*, 45 Tex. 454; *Somers v. Kansas Protective Union*, 42 Kan. 619; *Dodd v. Gloucester Mut. Fishing Ins. Co.*, 120 Mass. 468; *Cranberry Mut. Fire Ins. Co. v. Hawk* (N. J.), 14 Atl. 745; *Burlington V. R. D. v. White*, 41 Neb. 547; *Eilenberger v. Protective Mut. Fire Ins. Co.*, 89 Pa. St. 464; *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Gay v. Farmers' Mut. Ins. Co.*, 51 Mich. 245.

²⁴ *Mutual Life Ins. Co. v. Young's Adm'r*, 23 Wall. (U. S.) 85; *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. St. 339; *Globe Mut. Life Ins. Co. v. Snell*, 19 Hun (N. Y.), 560; *Eliason v. Henshaw*, 4 Wheat. (U. S.) 225; *Stockton v. Firemen's Ins. Co.*, 33 La. Ann. 577; *Harnickell v. New York Life Ins. Co.*, 111 N. Y. 390; *Wilson v. New*

some act. A mere mental attitude is not enough. Thus an insurer which has concluded to accept an application but has not communicated such intention, may subsequently refuse to accept the risk.²⁵ An insurance contract is not completed by the insurer consenting to a proposed change in a policy tendered when no notice of the acceptance is given to the insured;²⁶ nor by the signing of an application and the execution and tender of a policy to the applicant who thereupon refuses to accept it and pay the premium.²⁷ Even where the parties supposed they had agreed, and it turned out that there was a misunderstanding as to a material point, the requisite mutual assent as to that point being wanting, it was held that neither was bound.²⁸ The law involved is expressed by the phrase "it takes two to make a bargain."²⁹ The time during which an offer is to be accepted may be fixed by its own terms, or may be open, in which event the offer lapses after the expiration of a reasonable time.

Hampshire Fire Ins. Co., 140 Mass. 210; American S. B. Ins. Co. v. Wilder, 39 Minn. 350; Diboll v. Aetna Life Ins. Co., 32 La. Ann. 179; Sheldon v. Hekla Fire Ins. Co., 65 Wis. 436.

²⁵ See post, § 51; Rogers v. Charter Oak Life Ins. Co., 41 Conn. 97; Sheldon v. Atlantic F. & M. Ins. Co., 26 N. Y. 460, 84 Am. Dec. 213; Myers v. Keystone Mut. Life Ins. Co., 27 Pa. St. 268; Bennett v. City Ins. Co., 115 Mass. 241. Compare Keim v. Home Mut. F. & M. Ins. Co., 42 Mo. 38, 97 Am. Dec. 291.

²⁶ Equitable Life Assur. Soc. v. McElroy, 49 U. S. App. 548, 83 Fed. 631.

²⁷ Hogben v. Metropolitan Life Ins. Co., 69 Conn. 503; Schwartz v. Germania Life Ins. Co., 21 Minn. 215; Equitable Life Assur. Soc. v. McElroy, 49 U. S. App. 548, 83 Fed. 631.

²⁸ Baldwin v. Mildeberger, 2 Hall (N. Y.), 196; Goddard v. Monitor Mut. Fire Ins. Co., 108 Mass. 57; Coles v. Bowne, 10 Paige (N. Y.), 526; Calverley v. Williams, 1 Ves. Jr. 210; Crane v. Partland, 9 Mich. 493.

²⁹ Mutual Life Ins. Co. v. Young's Adm'r, 23 Wall. (U. S.) 85.

Correspondence — Negotiations by Mail.

When negotiations concerning any business transaction are carried on by persons at a distance from each other, either by letter or by messenger, or by telegraph, an undelivered offer is ineffectual for any purpose. The offer may be revoked if overtaken before delivered and accepted. But an attempted revocation after delivery and acceptance of the offer is too late. The acceptance may be transmitted by the same instrumentality which conveyed the offer, or by any other appropriate method of communication. It must be evidenced by some act indicating an intention to make the contract upon the identical terms proposed, and communicated or put in a way to be communicated to the party making the offer. A mailed offer by an insurance company, prescribing the terms upon which it will assume a risk, is deemed a valid undertaking on its part that it will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them. Upon the acceptance of the terms proposed transmitted by due course of mail to the company, the contract becomes complete, and the insurer is liable for a loss occurring after the letter of acceptance has been mailed but before it was received. The party to whom the proposal is made has a reasonable time in which to accept or reject it, except where by its terms the offer lapses within a specified time.³⁰

³⁰ *Eames v. Home Ins. Co.*, 94 U. S. 621; *Thayer v. Middlesex Mut. Fire Ins. Co.*, 10 Pick. (Mass.) 326; *Hallock v. Commercial Ins. Co.*, 26 N. J. Law, 268; *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390; *State Mut. Fire Ins. Ass'n v. Brinkley Stave & Heading Co.*, 61 Ark. 1, 29 L. R. A. 712; *Schultz v. Phenix Ins. Co.*, 77 Fed. 375 (negotiations by telegraph); *Myers v. Keystone Mut. Life Ins. Co.*, 27 Pa. St. 268; *Sandford v. Trust Fire Ins. Co.*, 11 Paige (N. Y.), 547; *Wallingford v. Home Mut. F. & M. Ins. Co.*, 30 Mo. 46; *Dailey v. Preferred Masonic Mut. Acc. Ass'n*, 102 Mich. 289, 57 N. W. 184;

The Execution of the Policy — Countersigning.

A policy, to be binding upon an insurer, must be executed by duly authorized officers or agents and in the manner provided by the organic law of the corporation. A seal is not necessary unless the insurer can only bind itself by sealed written contracts. If a delivered policy is defectively executed, its proper execution will be compelled if that be necessary to carry out the intention of the parties and to establish the contractual relations upon which they have agreed. This can be done in an action for specific performance of the oral agreement, or by a suit to reform the policy, according to the given circumstances, and in either of these proceedings the courts will grant appropriate equitable relief, and at the same time, if a loss has occurred, will enforce the contract as perfected.³¹

Policies frequently provide that they shall not be valid or binding upon the insurer unless signed by designated officers and countersigned by the agent through whom they are issued. There can be no doubt of the right of any insurance company to thus create conditions precedent to the validity of its policies and to their assumption of a risk through the issuance of a policy; and as an insured is conclusively presumed to know the contents and conditions of a policy under which he claims, he is held to have notice thereof and of any limitations they make upon the powers of agents. It is accordingly held that a recital in the policy itself that it shall not be in force until countersigned by an authorized agent renders the policy

Yonge v. Equitable Life Assur. Soc., 30 Fed. 902; *Hartford S. B. I. & Ins. Co. v. Lasher Stocking Co.*, 66 Vt. 439.

³¹ *Ante*, pp. 51-60, §§ 32, 33, "Specific Performance," notes 30-33; *post*, "Reformation;" *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. St. 344; *Mitchell v. Union Life Ins. Co.*, 45 Me. 104; *Herron v. Peoria M. & F. Ins. Co.*, 28 Ill. 235.

incomplete and invalid till so countersigned.³² But such a stipulation does not prevent an authorized agent from making a valid agreement to execute and deliver a policy in the usual form.³³ It seems that countersigning may sometimes be waived by an agent if an intention to issue the policy as a complete contract without such countersigning be shown;³⁴ but mere possession of a policy stating on its face that it is not to take effect until signed by the agent, and which is not so countersigned, is no evidence that the policy was ever delivered with such intention;^{34a} and the power of an agent to waive such a provision is not beyond question.³⁵

The Premium.

The premium is the consideration moving to the insurer for its assumption of a risk. A contract of insurance is not complete until the amount of the premium is agreed upon. It is not necessarily payable in advance. In the absence of

³² *Hardie v. St. Louis Mut. Life Ins. Co.*, 26 La. Ann. 242; *Noyes v. Phoenix Mut. Life Ins. Co.*, 1 Mo. App. 584; *Badger v. American Popular Life Ins. Co.*, 103 Mass. 244; *McCully's Adm'r v. Phoenix Mut. Life Ins. Co.*, 18 W. Va. 782; *Confederation Life Ass'n v. O'Donnell*, 10 Can. Sup. Ct. 92; *Peoria M. & F. Ins. Co. v. Walser*, 22 Ind. 73; *Security Ins. Co. v. Fay*, 22 Mich. 467, 7 Am. Rep. 670; *Wilkins v. State Ins. Co.*, 43 Minn. 177; *Grady v. American Cent. Ins. Co.*, 60 Mo. 116.

³³ *Ante*, §§ 29, 30.

³⁴ *Myers v. Keystone Mut. Life Ins. Co.*, 27 Pa. St. 268; *Kautreuer v. Penn Mut. Life Ins. Co.*, 5 Mo. App. 581; *Union Ins. Co. v. Smart*, 60 N. H. 458; *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241; *Norton v. Phoenix Mut. Life Ins. Co.*, 36 Conn. 503; *German Fire Ins. Co. v. Laggart*, 47 Kan. 663.

^{34a} *Prall v. Mutual Protection Life Assur. Soc.*, 5 Daly (N. Y.), 298; *Badger v. American Popular Life Ins. Co.*, 103 Mass. 244.

³⁵ *Wilkins v. State Ins. Co.*, 43 Minn. 177. And see *Security Ins. Co. v. Fay*, 22 Mich. 467; *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400; *Confederation Life Ass'n v. O'Donnell*, 10 Can. Sup. Ct. 92; *McCully's Adm'r v. Phoenix Mut. Life Ins. Co.*, 18 W. Va. 782.

any agreement concerning the time of payment of the premium and where no custom or usage to the contrary is shown, the presumption is that the attaching of the risk and the payment of the premium were intended to be coincident.³⁶

SAME — DELIVERY OF POLICY.

§ 47. Delivery may be actual or constructive, absolute or conditional. A policy becomes a binding contract —

- (a) When executed pursuant to an agreement where-
by an insurer accepts a risk, and
- (b) The execution is intended as the final evidence of
an acceptance of the risk, and
- (c) Nothing further is required to be done by the in-
sured to signify his adoption of it.

The delivery is complete whenever it is the intent of the parties that the policy shall become operative.

Generally. Actual delivery of an insurance policy to the insured is not essential to either its validity or completeness as a contract of insurance unless expressly made so by the preliminary negotiations of the insured and the insurer, or by the terms of the policy itself. The policy, as such, comes into existence at the moment it is executed by the insurer. The contract is, as we have seen, complete when the proposals of the one party have been accepted by the other, and the acceptance has been signified by some proper act. The proposal and acceptance may be oral, or written, or partly oral and partly written. Taken together they may constitute a contract of insurance *in praesenti* to be evidenced by the execution and delivery of a policy *in futuro*; or they may amount to no more than an agreement of the insurer to assume the risk as soon as a policy is executed and before it is delivered; or they may constitute an executory contract to insure upon the delivery

³⁶ Post, § 48, c. 6, 10.

to and acceptance of the policy by the insured. The fundamental question to be determined is, what was the real understanding of the parties and when did they agree and intend the policy would go into effect.³⁷

The burden is upon a claimant to establish the assumption of the risk before the delivery of a policy by clear proof;³⁸ whereas the possession of a policy by an insured is in itself evidence of the completion of the contract. Where there is no oral contract of insurance, and no contract contemplated except upon the delivery of the policy and payment of the premium, the relation of insurer and insured is not established until the policy is delivered and the premium is paid.³⁹ When there is nothing to show the manual possession of the policy in such a case, the contract is *prima facie* incomplete as a contract; and the burden is upon him who asserts it to show that the real intention and understanding of the parties was to pass the legal title and possession without delivery in fact, and to account for the circumstance that the policy has not been put into his possession, as contracts of that kind usually are when completely executed, or in other words to show constructive possession. But this only goes to the question of evidence. Constructive delivery and constructive

³⁷ Chamberlain v. Prudential Ins. Co. (Wis.), 85 N. W. 128; New York Life Ins. Co. v. Babcock, 104 Ga. 67, 42 L. R. A. 88; Newark Machine Co. v. Kenton Ins. Co., 50 Ohio St. 549, 22 L. R. A. 768; Yonge v. Equitable Life Assur. Soc., 30 Fed. 902; Lorscher v. Supreme Lodge K. H., 72 Mich. 316, 2 L. R. A. 206; Bishop v. Grand Lodge, 112 N. Y. 627; Mut. Life Ins. Co. v. Young's Adm'r, 23 Wall. (U. S.) 85; Hubbard v. Hartford Fire Ins. Co., 33 Iowa, 325; Franklin Ins. Co. v. Colt, 20 Wall. (U. S.) 560; Piedmont & A. Life Ins. Co. v. Ewing, 92 U. S. 377; Home Forum Ben. Order v. Jones, 5 Okla. 598, 50 Pac. 165.

³⁸ Ante, c. III, note 19.

³⁹ Wainer v. Milford Mut. Fire Ins. Co., 153 Mass. 335, 11 L. R. A. 598; Myers v. Liverpool & L. & G. Ins. Co., 121 Mass. 338.

possession, if proved, are sufficient. A delivery may be "actual, that is by doing something and saying nothing, or verbal, that is by saying something and doing nothing, or it may be by both. But it must be by something answering to one or the other or both of these," and with an intent to give effect to the policy.⁴⁰

When an application has been made, approved, and accepted, and a policy prepared and executed, and a notice of such execution given to the insured, as, for example, by mailing it to him, the contract of insurance is complete, and the applicant is entitled to the policy. Then the offer of the one has been accepted by the other, the minds of the parties have met, and nothing further is needed to secure to the applicant the indemnity for which he applied and which the insurer has consented to furnish him. An actual execution and a substituted delivery of the policy has been effected. A physical transmission of the policy would not enlarge—except so far as the matter of proof is concerned—nor does its absence diminish, his rights.⁴¹

Actual Delivery.

Where actual delivery is by the terms of the contract a condition precedent to the attaching of the risk, the liability does

⁴⁰ *Markey v. Mutual Ben. Life Ins. Co.*, 103 Mass. 92; *Phoenix Assur. Co. v. McAuthor*, 116 Ala. 659, 22 So. 900; *Heiman v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 153 (Gil. 127); *Morrison v. North American Ins. Co.*, 64 N. H. 137; *Merchants' Ins. Co. v. Union Ins. Co.*, 162 Ill. 173, and cases supra.

⁴¹ *Sheldon v. Connecticut Mut. Life Ins. Co.*, 25 Conn. 207; *Shattuck v. Mutual Life Ins. Co.*, 4 Cliff. 598, Fed. Cas. No. 12,715; *Lorscher v. Supreme Lodge K. H.*, 72 Mich. 316, 2 L. R. A. 206; *Bishop v. Grand Lodge*, 112 N. Y. 627; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390; *Dailey v. Preferred Masonic Mut. Acc. Ass'n*, 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171; *Tennant v. Travellers' Ins. Co.*, 31 Fed. 322.

not attach until the condition is met. The executory contract to issue and deliver a policy may still exist and remain valid and enforceable; but the policy as such has not become a contract until all conditions precedent created either by the preliminary contract or by the very terms of the policy itself have been fully complied with or effectually waived.⁴² And the delivery must be absolute and intended to divest the insurer of any right of control over the policy as well as to convey to the insured absolute dominion over it. The general rule is that where a policy is to go into effect only upon its delivery, it does not become effectual until it is delivered by the insurer to the insured or some one acting on his behalf with the mutual understanding that it shall thereupon take effect. Manual possession by the assured is not indispensable.⁴³ But the mutual understanding and intention is necessary, and the transaction must be had with the insured or someone authorized to act for him in the matter.⁴⁴

Possession of a policy is only presumptive evidence of its legal delivery. Thus in *Badger v. American Popular Life*

⁴² Cases supra; *Kohen v. Mutual Reserve Fund Life Ass'n*, 28 Fed. 705; *Misselhorn v. Mutual Reserve Fund Life Ass'n*, 30 Fed. 545; *McClave v. Mutual Reserve Fund Life Ass'n*, 55 N. J. Law, 187; *Harnickell v. New York Life Ins. Co.*, 111 N. Y. 390; *Yonge v. Equitable Life Assur. Soc.*, 30 Fed. 902; *Myers v. Liverpool & L. & G. Ins. Co.*, 121 Mass. 338.

⁴³ *Brown v. American Cent. Ins. Co.*, 70 Iowa, 390, 30 N. W. 647; *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 42 L. R. A. 88; *Schwartz v. Germania Life Ins. Co.*, 21 Minn. 215; *Morrison v. Insurance Co. of North America*, 64 N. H. 137; *Tennant v. Travellers' Ins. Co.*, 31 Fed. 322; *Hodge v. Security Ins. Co.*, 33 Hun (N. Y.), 583; *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65; *Hoyt v. Mutual Ben. Life Ins. Co.*, 98 Mass. 539.

⁴⁴ *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65; *Millville Mut. F. & M. Ins. Co. v. Collerd*, 38 N. J. Law, 480; *Heiman v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 153 (Gil. 127); *Hawley v. Michigan Mut. Life Ins. Co.*, 92 Iowa, 593, 61 N. W. 201; post, c. 8, "Agents."

Co.,⁴⁵ it was held that a policy of life insurance which provided that it should not be in force until countersigned by "A. B. agent" was invalid till so countersigned, although A. B. himself was the assured and the policy had been received and retained by him, there being no evidence of waiver.

Whether given occurrences and dealings with a policy are sufficient to constitute an actual delivery understood by both parties to pass the title in a policy to the insured is to be determined as a question of fact. In *Markey v. Mutual Benefit Life Ins. Co.*,⁴⁶ the question for determination was whether there was an actual or constructive delivery of the policy. The facts were: The husband was ill. The agent went to his house, taking the policy with him. He passed it to the husband, saying he had brought him his policy. The husband said he was glad of it, he had been expecting it for some days past. He took it, read it over, handed it to his wife, saying, "there is your policy." She took it, glanced it over, and laid it upon the table. The husband told the agent "that he was not well enough to go out and get the money to pay for the policy; that he had made an arrangement with B. to get the money and pay it to him." The agent said "he would go directly to B. and get the money for the policy." When he started to go the wife took the policy from the table and passed it to him, saying, "If you are going to B. for the money you may need the policy, and may as well take it and leave it with him." He took the policy. The wife's idea in giving it to him was that B. would want to see the amount he was to pay. Upon learning the policy had not been delivered to B. insured tendered the premium. It was held that the

⁴⁵ 103 Mass. 244; *Prall v. Mutual Life Protection Assur. Soc.*, 5 Daly (N. Y.), 298; *Davis v. Massachusetts Mut. Life Ins. Co.*, 13 Blatchf. 462, Fed. Cas. No. 3,642.

⁴⁶ 103 Mass. 78, 118 Mass. 178.

evidence was insufficient to warrant a finding that the policy had been delivered so as to make it a completed and binding contract.

Constructive Delivery.

A constructive delivery may be sufficient if evidenced by any act intended to signify that the instrument shall have present vitality, as where an application is accepted and a policy issued but never placed in the possession of the insured.⁴⁷

Delivery to Insurer's Agent.

In determining whether a policy was delivered, effect must always be given to the intention of the parties, and what their conduct shows they considered a delivery must control. When the terms of an executed contract have been accepted by the insured, and the parties have thereafter treated it as in force, its delivery will be regarded as complete although it never passed out of the hands of the agent of the insurer. And the delivery by an insurer to its agent of a policy to be unconditionally delivered by him to an insured, is in contemplation of law a delivery to the insured, even though its delivery to the applicant is by the policy made essential to its validity.⁴⁸ And in

⁴⁷ *Fried v. Royal Ins. Co.*, 47 Barb. (N. Y.) 127; *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 22 L. R. A. 768; *Schwartz v. Germania Life Ins. Co.*, 21 Minn. 215; *Sheldon v. Connecticut Mut. Life Ins. Co.*, 25 Conn. 207; *Lorscher v. Supreme Lodge K. H.*, 72 Mich. 316, 2 L. R. A. 206. See, also, *Heiman v. Phenix Mut. Life Ins. Co.*, 17 Minn. 153 (Gil. 127); *Union Cent. Life Ins. Co. v. Pauly*, 8 Ind. App. 85, 35 N. E. 190.

⁴⁸ *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 22 L. R. A. 768; *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 42 L. R. A. 88; *Mutual Life Ins. Co. v. Thomson*, 94 Ky. 253; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96; *Kelly v. St. Louis Mut. Life Ins. Co.*, 3 Mo. App. 554.

such case the agent cannot refuse to deliver the policy to the assured upon tender of the premium even though the risk has become undesirable, as where the risk is on a life, and before the arrival of the policy the applicant has become dangerously ill.⁴⁹ In *Dibble v. Northern Assurance Co.*,⁵⁰ the plaintiff had for several years before the policy in suit was issued, placed his insurance with defendant's agent with authority to keep his property insured in such companies as he (the agent) might select, and to renew his policies whenever necessary. The agent placed certain risks in the S. company which afterwards directed their cancellation. These policies were cancelled by the agent who thereupon placed the risks in defendant company, issued a policy and placed it in his safe for plaintiff, charged plaintiff and credited defendant with the premium and notified both. This was held a sufficient delivery. And so where the original agreement between the applicant and the agent was that the latter should keep the policy when executed for the use and benefit of the former;⁵¹ and where the policy is redelivered to the agent to be kept by him with other papers of the insured;⁵² and where after being notified of the issuance of the policy the insured left it uncalled for in the hands of the agent;⁵³ and where a renewal receipt was retained by the agent at request of the insured.⁵⁴ Where the application stip-

⁴⁹ *Schwartz v. Germania Life Ins. Co.*, 21 Minn. 215; *Porter v. Mutual Life Ins. Co.*, 70 Vt. 504, 41 Atl. 970; *Southern Life Ins. Co. v. Kempton*, 56 Ga. 339; *Yonge v. Equitable Life Assur. Soc.*, 30 Fed. 902.

⁵⁰ 70 Mich. 1, 37 N. W. 704; *Hamm Realty Co. v. New Hampshire Fire Ins. Co.*, 80 Minn. 139, 83 N. W. 41; post, notes 78, 79.

⁵¹ *Franklin Ins. Co. v. Colt*, 20 Wall. (U. S.) 560.

⁵² *Phoenix Ins. Co. v. Meier*, 28 Neb. 124, 44 N. W. 97.

⁵³ *Phoenix Assur. Co. v. McAuthor*, 116 Ala. 659, 22 So. 903.

⁵⁴ *Tennant v. Travellers' Ins. Co.*, 31 Fed. 322.

ulates that the agent of the company who forwards it shall act for both parties, delivery of the policy to him perfects the contract.⁵⁵ But the mere assumption of authority to act on behalf of the assured is not enough—the agent must derive the power from his principal.⁵⁶ Thus a policy written and intended as a substitute for another policy in another company, but not delivered and of which the insured has no knowledge until after the property has been destroyed, is not a binding contract.⁵⁷ A general insurance agency, which represents several companies with authority to execute, issue and cancel policies for them all in proper cases, may also act as agent of an insured in waiving notice of cancellation of policies issued by any such companies, and in accepting for the insured new policies issued by itself in lieu of those canceled.⁵⁸

Delivery by Mail.

A contract is complete when an application has been accepted and a policy executed and deposited in the mail, postage prepaid, addressed to the applicant, with intent to have it take immediate effect,⁵⁹ and so if it be properly mailed to the agent of the insurer for unconditional delivery to the insured.⁶⁰ It is immaterial that the policy does not reach

⁵⁵ *Alabama Gold Life Ins. Co. v. Herron*, 56 Miss. 643.

⁵⁶ See post, c. 8.

⁵⁷ *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65. See *Dibble v. Northern Assur. Co.*, 70 Mich. 1, 37 N. W. 704; *Merchants' Ins. Co. v. Union Ins. Co.*, 162 Ill. 173.

⁵⁸ *Hamm Realty Co. v. New Hampshire Fire Ins. Co.*, 80 Minn. 139, 83 N. W. 41.

⁵⁹ *Northampton Mut. Ins. Co. v. Tuttle*, 40 N. J. Law, 476; *Dailey v. Preferred Masonic Mut. Acc. Ass'n*, 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171; *Yonge v. Equitable Life Assur. Soc.*, 30 Fed. 902.

⁶⁰ *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96; *Porter v. Mutual Life Ins. Co.*, 70 Vt. 504, 41 Atl. 970; ante, note 48.

either the insured,⁶¹ or the agent,⁶² till after a loss has occurred, or that the policy provides that it shall not be in force until its delivery to the applicant "during his life and good health."⁶³

Stipulations in Application or Policy Requiring Delivery.

A stipulation or condition in either an application or a policy that the contract shall not take effect until a policy is actually delivered to the applicant creates a valid condition precedent to the consummation of the contract, and the condition must be either performed or waived before the policy becomes operative.⁶⁴ A waiver takes place when the policy is delivered by the insurer itself⁶⁵ or through an agent with authority to bind it by such an act.⁶⁶

Conditional Delivery.

A policy may be delivered conditionally, in which case liability does not attach until the condition has been met or performed. An absolute and unconditional delivery does not occur until there is a transfer of the legal possession of the policy to the insured or to some person acting for him with

⁶¹ Dailey v. Preferred Masonic Mut. Acc. Ass'n, 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171.

⁶² Kentucky Mut. Ins. Co. v. Jenks, 25 Ind. 96.

⁶³ Mutual Reserve Fund Life Ass'n v. Farmer, 65 Ark. 581, 47 S. W. 850.

⁶⁴ See ante, note 42; Chamberlain v. Prudential Ins. Co. (Wis.), 85 N. W. 128; Schaffer v. Mutual Fire Ins. Co., 89 Pa. St. 296; Badger v. American Popular Life Ins. Co., 103 Mass. 244; Ormond v. Fidelity Life Ass'n, 96 N. C. 158; McCully's Adm'r v. Phoenix Mut. Life Ins. Co., 18 W. Va. 782.

⁶⁵ Mutual Reserve Fund Life Ass'n v. Farmer, 65 Ark. 581, 47 S. W. 850; Dailey v. Preferred Masonic Mut. Acc. Ass'n, 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171.

⁶⁶ Post, c. 8, "Agents;" post, c. 18, "Waiver and Estoppel;" Connecticut Ind. Ass'n v. Grogan's Adm'r (Ky.), 52 S. W. 959.

the intent to give effect to the policy as a completed contract. Thus the exhibition of a policy to an applicant, or his temporary possession of the same while reading it, followed by its return to the agent constitute only a conditional delivery;⁶⁷ and likewise the delivery of a policy upon the agreement that it was issued only as a substitute for a previous policy which was to be surrendered, and which never was surrendered but enforced and paid;⁶⁸ and where the absolute delivery is dependent upon the approval of an agent's act by the insurer itself;⁶⁹ and where a policy different from the one requested by an applicant is handed to him with a request that he return it if he did not wish to comply with its terms and pay the premiums;⁷⁰ and where the attaching of the risk is contingent upon the premium being paid or some other event.⁷¹ And parol evidence is admissible to prove that a policy, which is in form a complete contract, and of which there has been a manual transmission, was not intended to and did not become a binding contract until the occurrence or performance of some condition precedent resting in parol.⁷²

Delivery Obtained by Fraud.

An insured cannot recover upon a policy which he has obtained through fraud, or misrepresentation, or concealment

⁶⁷ *Heiman v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 153 (Gil. 127); *Markey v. Mutual Ben. Life Ins. Co.*, 118 Mass. 178, 126 Mass. 158.

⁶⁸ *Faunce v. State Mut. Life Assur. Co.*, 101 Mass. 279.

⁶⁹ *Nutting v. Minnesota Fire Ins. Co.*, 98 Wis. 26, 73 N. W. 432.

⁷⁰ *Myers v. Keystone Mut. Life Ins. Co.*, 27 Pa. St. 268.

⁷¹ *Harnickell v. New York Life Ins. Co.*, 111 N. Y. 390; *Ware v. Allen*, 128 U. S. 590; *Mutual Life Ins. Co. v. Young's Adm'r*, 23 Wall. (U. S.) 85; *Brown v. American Cent. Ins. Co.*, 70 Iowa, 390, 30 N. W. 647.

⁷² *Nutting v. Minnesota Fire Ins. Co.*, 98 Wis. 26, 73 N. W. 432; *Shields v. Equitable Life Assur. Soc.*, 121 Mich. 690, 80 N. W. 793; *Faunce v. State Mut. Life Assur. Co.*, 101 Mass. 279.

of facts material to the risk and which he ought to have communicated to the insurer.⁷³

Loss After Agreement is Made but Before Policy is Delivered.

Since an oral contract of insurance is valid and enforceable, it follows that an oral agreement to insure *in praesenti*, though contemplating the future execution and delivery of a policy, protects the insured, and furnishes him the stipulated indemnity against loss or damage occurring before the delivery of the policy. The remedy of the insured in such a case is either by an action at law upon the oral contract of insurance, or by a proceeding in equity to compel the execution of the contract, and to recover upon it as thus executed, or by an action for breach of contract to insure, according to the circumstances.⁷⁴ Whether there was an oral contract of insurance to become operative at once, or simply an executory contract for insurance to become effectual upon the delivery of a policy, must be determined according to the rules already laid down. If delivery be essential, it is completed when the policy has been executed, and the insurer intends it to become operative, and nothing further remains to be done by the insured to signify his acceptance of it.⁷⁵ Until that time the insurer is not liable.⁷⁶

Where an insurer has agreed to give written consent to a transfer of one of its policies upon given conditions which have been performed, and the policy has been forwarded to it for indorsement, it is bound by the transfer, and estopped to

⁷³ *Wales v. New York Bowery Fire Ins. Co.*, 37 Minn. 106; *Piedmont & A. Life Ins. Co. v. Ewing*, 92 U. S. 377; *Cable v. United States Life Ins. Co.*, 111 Fed. 19.

⁷⁴ *Ante*, §§ 30-33.

⁷⁵ *Ante*, p. 88.

⁷⁶ *Allen v. Massachusetts Mut. Acc. Ass'n*, 167 Mass. 18, 44 N. E. 1053; *Lightbody v. North American Ins. Co.* 23 Wend. (N. Y.) 18. Compare *Cooke v. Aetna Ins. Co.*, 7 Daly (N. Y.), 555.

dispute its validity though a loss occurred before the policy has been received or the indorsement made.⁷⁷ When an application for insurance is made to an agent representing several companies, the agent to select the companies and distribute the risks, a valid contract of insurance is made with each company as soon as its policy is signed, although the property insured is destroyed by fire before the policies are delivered. In distributing the risks the agent is acting for the insured.⁷⁸ But if the agent under such circumstances is not authorized by the applicant to select the companies, no contractual relation exists between the applicant and any insurer until a policy has been executed and delivered and accepted.⁷⁹ In a Missouri case it appeared that an application was made and accepted February 9th and the policy immediately made out, but the premium was not paid nor the policy delivered until March 14th. At the time of the delivery the property was on fire, which fact was known to the insured but not to the company. It was held that the contract was completed on February 9th and that the insured was not bound to disclose the conditions existing when he obtained the policy.⁸⁰ In the absence of an oral agreement for insurance the risk does not attach until delivery of the policy although the policy has been executed and the applicant has been notified that it is ready for him.⁸¹ An insurance company which on September

⁷⁷ *Medearis v. Anchor Mut. Fire Ins. Co.*, 104 Iowa, 88, 73 N. W. 495.

⁷⁸ *Michigan Pipe Co. v. Michigan F. & M. Ins. Co.*, 92 Mich. 482, 20 L. R. A. 277. Compare *New York L. & W. W. Co. v. People's Fire Ins. Co.*, 96 Mich. 20, 55 N. W. 434.

⁷⁹ *Kleis v. Niagara Fire Ins. Co.*, 117 Mich. 469, 76 N. W. 155.

⁸⁰ *Keim v. Home Mut. F. & M. Ins. Co.*, 42 Mo. 38; *Hallock v. Commercial Ins. Co.*, 26 N. J. Law, 268.

⁸¹ *Wainer v. Milford Mut. Fire Ins. Co.*, 153 Mass. 335, 11 L. R. A. 598; *Myers v. Liverpool & L. & G. Ins. Co.*, 121 Mass. 338.

19th acknowledges the receipt from its agent, authorized to issue policies, of an application made on September 11th for insurance to begin September 12th and setting forth all the terms of the previous contract and which directs the agent to write out a policy for the desired amount, is liable for a loss occurring September 21st, although the agent writes out the policy for one year commencing September 22d.⁸²

Loss Before Any Contract is Made — Retroactive Policies.

Policies are sometimes intended to have a retroactive effect. No particular form of words is necessary to make a policy retroactive. It is sufficient if it appears by the description of the risk and the subject matter of the contract that the policy was intended to cover a previous loss. Contracts of this kind are as valid as those intended to cover a subsequent loss, if the insured, as well as the insurer are ignorant of the loss at the time the contract is made. But if the property has been destroyed before the terms of the contract have been agreed upon, and the applicant knows this fact but does not communicate it to the insurer who accepts the risk and issues an antedated policy in ignorance of the loss, the policy is void as to and will not cover the loss, although antedated as of a time prior to the loss.⁸³ Unless a binding contract of in-

⁸² *Hartford Fire Ins. Co. v. King*, 106 Ala. 519, 17 So. 707. See, also, *Dailey v. Preferred Masonic Mut. Acc. Ass'n*, 102 Mich. 289, 26 L. R. A. 171; *Mutual Reserve Fund Life Ass'n v. Farmer*, 65 Ark. 581, 47 S. W. 850; *Angell v. Hartford Fire Ins. Co.*, 59 N. Y. 171; *Cooper v. Pacific Mut. Life Ins. Co.*, 7 Nev. 116; *Fried v. Royal Ins. Co.*, 50 N. Y. 243.

⁸³ *Wales v. New York Bowery Fire Ins. Co.*, 37 Minn. 106; *Sutherland v. Pratt*, 11 Mees. & W. 296; *Haskin v. Agricultural Fire Ins. Co.*, 78 Va. 700; *Mercantile Mut. Ins. Co. v. Folsom*, 18 Wall. (U. S.) 237; *Hallock v. Commercial Ins. Co.*, 26 N. J. Law, 268; *Collins v. Phoenix Ins. Co.*, 14 Hun (N. Y.), 534; *Cobb v. New England Mut. M. Ins. Co.*, 6 Gray (Mass.), 192.

insurance has been made before a loss, it is not within the power of an agent to ratify an imperfect contract by issuing a policy thereafter.⁸⁴ The acceptance of an application for life insurance and the execution of a policy after the death of the applicant and without knowledge thereof, followed by a delivery of the policy at the place where the deceased had resided, do not constitute a valid contract.⁸⁵ And a contract of insurance wholly made after the death of the party intended to be insured, the insurer being ignorant of that fact, is void, although a policy be issued and dated prior to the death.⁸⁶

DURATION OF CONTRACT.

§ 48. The intent of the parties as to the commencement and ending of the contract and risk governs, if it can be ascertained from the contract and subject matter and negotiations.

The term of the insurance, that is the period during which the liability of the insurer continues, its inception and ending, is one of the essentials of the contract. It must be fixed by the contract itself or be inferable from the negotiations and circumstances surrounding the consummation of the contract.⁸⁷ It may by stipulation not commence until a policy is delivered, or countersigned and delivered, or unless countersigned and delivered before any material change takes

⁸⁴ Hartford Fire Ins. Co. v. McKenzie, 70 Ill. App. 615; Franklin Ins. Co. v. Colt, 20 Wall. (U. S.) 560; Stebbins v. Lancashire Ins. Co., 60 N. H. 65; People v. Dimick, 41 Hun (N. Y.), 616, 107 N. Y. 13; Blake v. Hamburg Bremen Fire Ins. Co., 67 Tex. 160.

⁸⁵ Misselhorn v. Mutual Reserve Fund Life Ass'n, 30 Fed. 545. See Mutual Life Ins. Co. v. Young's Adm'r, 23 Wall. (U. S.) 85; Piedmont & A. Life Ins. Co. v. Ewing, 92 U. S. 377.

⁸⁶ Lefavour v. Insurance Co., 1 Phil. (Pa.) 558, 2 Bigelow, Life & Acc. Rep. 158.

⁸⁷ Ante, §§ 17, 40-46.

place in the nature of the risk; or it may begin upon the date of the application and continue for a fixed period unless the application be sooner rejected; or the policy when issued may have a retroactive effect or be dated prior to the day of its execution and cover risks which have occurred prior to that time. The intent of the parties when ascertainable should control.⁸⁸

The supreme court of California has laid down the following rules which contain both a comprehensive and succinct statement of the law on this point:

“(1) Where the exact time of the commencement and termination of the risk are specified in the policy, or, if no policy has been written, in the contract, such specification governs.

“(2) Where no time has been expressly indicated, the circumstances of the case will be considered for the purpose of determining it.

“(3) If there are no circumstances indicating the intention of the parties, and no time is specified in the contract,

⁸⁸ See *supra*. And see *Buse v. Mutual Ben. Life Ins. Co.*, 23 N. Y. 516; *Bradley v. Potomac Fire Ins. Co.*, 32 Md. 108; *Whittaker v. Farmers' Union Ins. Co.*, 29 Barb. (N. Y.) 312; *Hallock v. Commercial Ins. Co.*, 26 N. J. Law, 268; *Commercial Ins. Co. v. Hallock*, 27 N. J. Law, 645; *Lightbody v. North American Ins. Co.*, 23 Wend. (N. Y.) 18; *City of Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa, 276; *American Horse Ins. Co. v. Patterson*, 28 Ind. 17; *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328; *Isaacs v. Royal Ins. Co.*, 39 Law J. Exch. 189; *Atkins v. Sleeper*, 7 Allen (Mass.), 487; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96; *Perry v. Provident Life Ins. & Inv. Co.*, 99 Mass. 162; *Sherwood v. Agricultural Ins. Co.*, 73 N. Y. 447; *Schroeder v. Trade Ins. Co.*, 109 Ill. 157; *Grousset v. Sea Ins. Co.*, 24 Wend. (N. Y.) 209; *Collins v. Phoenix Ins. Co.*, 14 Hun (N. Y.), 534; *Walker v. Protection Ins. Co.*, 29 Me. 317; *Bradlie v. Maryland Ins. Co.*, 12 Pet. (U. S.) 378; *Krumm v. Jefferson Fire Ins. Co.*, 40 Ohio St. 225.

the risk will be deemed to have commenced at the date of the contract.

“(4) In the case last mentioned, if before the contract of insurance is made the property has ceased to exist, although unknown to the parties, the risk never attaches.”⁸⁹

The charging of a full year's premium for a policy of reinsurance in which no dates are fixed is indicative of an intention to reinsure from the date of the original policy.⁹⁰ A policy which in terms begins upon a date certain but contains a stipulation that it shall not be effectual until issued and delivered, takes effect after it is delivered from the date stated in its terms and not from the date of delivery.⁹¹ Liability for only a single year is assumed by a company which issues its policy promising to pay a given amount in case of the death of the insured before noon of a date precisely one year from the date of the policy.⁹² From the use of the phrase “at 12 o'clock noon” it will be presumed that the hour of twelve o'clock sun time was intended, and the customary use of standard time at the place of the making of the contract is not alone sufficient to show that by the custom of the place this phrase meant at twelve o'clock standard time.⁹³ A second benefit certificate issued to one who had received payment under a former certificate which had been canceled, will not relate back to the date of the first certificate, even though it purports to be a “substitute” for the first one, so as to cover death resulting from injuries sustained while the first certificate

⁸⁹ Union Ins. Co. v. American Fire Ins. Co., 107 Cal. 327, 28 L. R. A. 692.

⁹⁰ Philadelphia Life Ins. Co. v. American Life & Health Ins. Co., 23 Pa. St. 65.

⁹¹ Gordon v. United States Casualty Co. (Tenn.), 54 S. W. 98.

⁹² Rosenplaenter v. Provident Sav. Life Assur. Soc., 91 Fed. 728.

⁹³ Jones v. German Ins. Co., 110 Iowa, 75, 46 L. R. A. 860, 81 N. W. 188.

was in force, where the premium charged is different and the new certificate provides that it does not cover death in consequence of a previous wound or injury.⁹⁴

A contract of insurance is deemed to have been made at the date of the policy notwithstanding it provides for an insurance of the property from a time anterior to that date, when it appears by an express provision of the application upon which it was issued that no liability should attach until the application should be approved by the insurers, and that such approval was made on the day the policy was dated.⁹⁵

A policy dated and issued after a loss and not made to take effect prior to its issue will not support a recovery for the loss though there be proof of an earlier parol agreement to insure; but a valid parol contract for a policy for one year, made in October, and providing for the issuing of the policy early in November, will protect the applicant from damage by a fire occurring November 19th. The remedy is by suit to enforce the parol contract.⁹⁶ Where application for insurance was made to an authorized agent upon the 18th of the month and it was agreed that the policy should be issued on that day, and the policy was in fact issued on that day but was not delivered nor the premium paid till the 22d, it was held that the policy commenced to run on the 18th.⁹⁷

In *Parry v. Provident Life Ins. & Inv. Co.*,⁹⁸ a policy of in-

⁹⁴ *Wood v. Massachusetts Mut. Acc. Ass'n*, 174 Mass. 217, 54 N. E. 541.

⁹⁵ *Dayo v. Hawkeye Ins. Co.*, 72 Iowa, 597, 34 N. W. 435.

⁹⁶ *Home Ins. Co. v. Adler*, 71 Ala. 516, 77 Ala. 242.

⁹⁷ *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325.

⁹⁸ 99 Mass. 162. See *Thibeault v. St. Jean Baptist Ass'n*, 21 R. I. 157, 42 Atl. 518. "From"—"until," *Isaacs v. Royal Ins. Co.*, L. R. 5 Exch. 296, 22 Law T. (N. S.) 681; *Howard's Case*, 2 Salk. 625; "between" dates, *Atkins v. Boylston F. & M. Ins. Co.*, 5 Metc. (Mass.) 439. See, also, 2 *Parsons, Contracts* (7th Ed.), pp. 635, *504, 795-

insurance "for the period of twelve months" from noon of the day of its date to noon of the day of its expiration, was made "against loss of life" of the assured, in a sum payable to his widow on proof "that the assured at any time after the date hereof, and before the expiration of this policy, shall have sustained personal injury caused by any accident," "and such injuries shall occasion death within ninety days from the happening thereof." By an accident which happened at nine o'clock in the forenoon, the assured sustained personal injuries which occasioned his death about the same hour on the ninety-first day thereafter, excluding the day of date of the accident from the computation; the whole period being included within the twelve months. It was held that death did not occur within ninety days from the happening of accident, and that the clause limiting the liability of the insurer to the occurrence of death from the injuries within ninety days from the happening of the accident was not inconsistent with the provision by which insurance was given "for the period of twelve months," nor did it refer only to such injuries as should occasion death within ninety days after the twelve months.

The acceptance of an application for membership in a mutual organization does not bind the applicant to continue his membership indefinitely.⁹⁹ A contract of insurance is terminated by an assignment for the benefit of creditors made by the insurer during the life of the contract.¹⁰⁰

798, *662-665; *Protection Life Ins. Co. v. Palmer*, 81 Ill. 88; *Liberty Hall Ass'n v. Housatonic Mut. Fire Ins. Co.*, 7 Gray (Mass.), 261.

⁹⁹ *Bankers' Acc. Ins. Co. v. Rogers*, 73 Minn. 12, 75 N. W. 747.

¹⁰⁰ *Smith v. National Credit Ins. Co.*, 65 Minn. 283, 33 L. R. A. 511. See *Boston & A. R. Co. v. Mercantile Trust & Deposit Co.*, 82 Md. 535, 38 L. R. A. 97.

RENEWAL OF CONTRACT.

§ 49. A valid contract of renewal of insurance may be made by parol. It must contain all the essentials of a valid original contract.

A parol agreement to renew an existing policy of insurance is valid. It may be made by any agent who has authority to solicit insurance, accept risks, agree upon and settle the terms of insurance, and issue and renew policies. The premium need not be paid in advance, nor tendered on the day when the renewal should be made, provided the course of dealing between the parties has been such as to justify the inference and belief that credit is to be extended.¹⁰¹ The oral promise to renew must contain all the essential elements of a valid contract of insurance.¹⁰² The agreement upon the essentials may be express or implied. It is sufficient if the minds of the parties met as to the terms, and nothing remained to be done except that the agent should renew the expiring policy and that the insured should then or later pay the premium.¹⁰³ Thus where a policy for a single year at a stipulated annual premium has been once renewed, an agreement for another renewal accompanied by a payment of the same premium, but without any term being fixed, will continue the policy in force for another year.¹⁰⁴ Upon fail-

¹⁰¹ See ante, p. 45, § 29; *Eames v. Home Ins. Co.*, 94 U. S. 629; *McCabe v. Aetna Ins. Co.*, 9 N. D. 19, 81 N. W. 429; *Baldwin v. Phoenix Ins. Co. (Ky.)*, 54 S. W. 13; *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553; *Squier v. Hanover Fire Ins. Co.*, 18 App. Div. 575, 46 N. Y. Supp. 30.

¹⁰² *Sater v. Henry County Farmers' Ins. Co.*, 92 Iowa, 579, 61 N. W. 209; ante, §§ 17, 29, 30; *Mallette v. British American Assur. Co.*, 91 Md. 471, 46 Atl. 1005.

¹⁰³ *King v. Hekla Fire Ins. Co.*, 58 Wis. 508; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164.

¹⁰⁴ *Scott v. Home Ins. Co.*, 53 Wis. 238.

ure of the authorized agent of an insurer to renew an expiring policy the insurer becomes liable in an action for damages by the insured to the same extent as if the policy had been renewed; or an action will lie against it for specific performance of its agreement to renew.¹⁰⁵

There is some disagreement among authorities as to the effect of a renewal. Mr. May says: "It is generally held to be a new contract, upon the terms and conditions stated in the policy expired—the old application, in the absence of evidence to the contrary, serving as the basis of the new contract, and as if made at the date of the renewal."¹⁰⁶ But the renewal may be upon different terms and amount to a modification of the former contract. And there would seem to be a difference between life insurance contracts which are in their nature continuous during the life of the insured though contingent upon the payment of stipulated premiums, and fire insurance contracts which are intended only to cover specified risks for shorter periods of time and usually contain provisions permitting of their cancellation.

A renewal receipt is simply evidence of a continuance of the original contract between the same parties, upon the same risk and subject to the same hazard, unless the insurer has consented to some substitution of interests or change of risk and hazard.¹⁰⁷ An insurer is estopped to deny the renewal of a policy where its agents, who had power to insure, represented to the insured that it had been renewed, and received

¹⁰⁵ Ante, §§ 30-33.

¹⁰⁶ 1 May, Ins. (3d Ed.) § 70; *Peacock v. New York Life Ins. Co.*, 20 N. Y. 293; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164; *Witherell v. Marine Ins. Co.*, 49 Me. 200.

¹⁰⁷ *Firemen's Ins. Co. v. Floss*, 67 Md. 403; *Lancey v. Phoenix Fire Ins. Co.*, 56 Me. 562.

and appropriated money which was paid to cover the cost of renewal.¹⁰⁸

The agreement to renew must be clear as well as complete. Loose and informal conversations between an agent and an insured will not bind the insurer. It must appear that the parties intended to make a renewal agreement and understood that they had perfected the agreement.¹⁰⁹ When this appears, the renewal contract is complete, even though the policy itself provides that it shall not be renewed in that manner.¹¹⁰ No present and valid contract of renewal which will make an insurer liable for a subsequent loss is shown by proof that shortly before the expiration of a former policy, an insured instructed his employee, who was also the insurer's agent, to renew the policy when it expired, which the agent promised, but neglected to do.¹¹¹ A condition in a renewal policy that the party insured is in "good health" is to be construed in connection with the terms of the original policy and the statements therein made respecting health.¹¹²

¹⁰⁸ *International Trust Co. v. Norwich Union Fire Ins. Soc.*, 71 Fed. 81, 17 C. C. A. 608.

¹⁰⁹ *O'Reilly v. Corporation of London Assur. Co.*, 101 N. Y. 575; *Mallette v. British American Assur. Co.*, 91 Md. 471, 46 Atl. 1005; *Croghan v. New York Underwriters' Agency*, 53 Ga. 109; *Taylor v. Phoenix Ins. Co.*, 47 Wis. 365. A preliminary agreement to keep the policy alive, not incorporated in the policy itself, is of no effect. *Giddings v. Phoenix Ins. Co.*, 90 Mo. 272. And see *Royal Ins. Co. v. Beatty*, 119 Pa. St. 6.

¹¹⁰ *McCabe v. Aetna Ins. Co.*, 9 N. D. 19, 81 N. W. 429; *Cohen v. Continental Fire Ins. Co.*, 67 Tex. 325. See *Giddings v. Phoenix Ins. Co.*, 90 Mo. 272.

¹¹¹ *Idaho Forwarding Co. v. Fireman's Fund Ins. Co.*, 8 Utah, 41, 17 L. R. A. 586.

¹¹² *Peacock v. New York Life Ins. Co.*, 20 N. Y. 293, 1 Bosw. 338; *Day v. Mutual Ben. Life Ins. Co.*, 4 Bigelow, Life & Acc. Rep. 15. Effect upon rights of creditors, *Norwood v. Guerdon*, 60 Ill. 253, 4

REVIVAL OF POLICY.

§ 50. When a policy, which does not in terms provide for its revival, lapses or is forfeited, it can only be revived

(a) By a new contract upon a sufficient consideration; or

(b) By the insurer waiving the lapse or forfeiture.

As the word "renewal" presupposes the existence of a live and existing contract whose continuation was sought or agreed upon, so the word "revival" contemplates the expiration of a previous contract whose reinstatement is under consideration. Nothing can revive a policy which has become null and void except a new contract supported by a valid and sufficient consideration,¹¹³ or such conduct of the insurer as amounts to a waiver and operates as an estoppel.¹¹⁴ The receipt of a premium after knowledge of a forfeiture is a waiver of the forfeiture; but such knowledge on the part of the insurer at the time of payment must be proved before a waiver is established.¹¹⁵ It has been held that the attaching of a mortgage clause to a forfeited policy without a new consideration creates no liability against an insurer;¹¹⁶ nor does a consent to a transfer of the policy.¹¹⁷ An agent cannot revive a forfeited policy by giving an antedated receipt for

Bigelow. Life & Acc. Rep. 30; *Clarke v. Schwarzenberg*, 164 Mass. 347.

¹¹³ *Lantz v. Vermont Life Ins. Co.*, 139 Pa. St. 546; *Phoenix Ins. Co. v. Tomlinson*, 125 Ind. 84; *New York Cent. Ins. Co. v. Watson*, 23 Mich. 486.

¹¹⁴ *Security Ins. Co. v. Fay*, 22 Mich. 467; *Brink v. Hanover Fire Ins. Co.*, 70 N. Y. 593.

¹¹⁵ *Ellis v. State Ins. Co.*, 68 Iowa, 578, 27 N. W. 762; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368.

¹¹⁶ *Baldwin v. German Ins. Co.*, 105 Iowa, 379, 75 N. W. 326.

¹¹⁷ *Davis v. German American Ins. Co.* 135 Mass. 251. See, also, *Graham v. Fireman's Ins. Co.*, 87 N. Y. 69; *Hanover Fire Ins. Co. v. National Exchange Bank (Tex.)*, 34 S. W. 333.

the premium;¹¹⁸ nor by redelivery of a canceled policy after a loss.¹¹⁹ But an agent empowered to issue and renew policies is usually held to have power to waive violations of their conditions, and in so far as he acts within his authority binds his principal by waiver express or implied, so long as his acts are not illegal.¹²⁰

A life policy which has lapsed through non-payment of the premium, is not revived by a payment made after the death of the insured, where the fact of death was unknown to the insurer when the payment was accepted.¹²¹ Where consent of an insurer is obtained to the revival of a policy only by the making and approval of a renewal application, the representations contained therein become a part of the original contract.¹²² Reinstatement of a policy will, upon a proper showing, be coerced by a court of equity, as where a surrender has been obtained through fraud or deceit or misrepresentation.¹²³ When the contract is silent as to the conditions upon which it may be revived after it has lapsed or been forfeited, an insurer is under no obligation to consent to a revival or renewal, and may attach such conditions precedent as it chooses to its consent if given; but, where the contract itself prescribes the terms, the insured need do no more than comply with such terms, and the consent of the insurer is unnecessary.¹²⁴

¹¹⁸ *Diboll v. Aetna Life Ins. Co.*, 32 La. Ann. 179.

¹¹⁹ *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502; *Crown Point Iron Co. v. Aetna Ins. Co.*, 53 Hun, 220, 6 N. Y. Supp. 602.

¹²⁰ Post, c. 8, "Agents."

¹²¹ *Wyman v. Phoenix Mut. Life Ins. Co.*, 45 Hun (N. Y.), 184; *Ellis v. State Ins. Co.*, 68 Iowa, 578, 27 N. W. 762.

¹²² *Metropolitan Life Ins. Co. v. McTague*, 49 N. J. Law, 587.

¹²³ *Heinlein v. Imperial Life Ins. Co.*, 101 Mich. 250, 25 L. R. A. 627.

¹²⁴ *Manson v. Grand Lodge A. O. U. W.*, 30 Minn. 509; *Dennis v. Massachusetts Ben. Ass'n*, 120 N. Y. 496, 9 L. R. A. 189; *Jackson v.*

APPLICATION.

§ 51. An application is a mere request or proposal for insurance.

§ 52. The application may be, but is not necessarily, a part of a contract or policy issued by an insurer in acceptance of the proposal.

An application for insurance is a very different thing from the contract of insurance to which it leads. It is only an offer by one who desires to be insured to some insurer to enter into a contract concerning a specified subject matter upon specified terms. This offer the insurer may accept or reject, absolutely or with some qualification or condition. The contract is not made until the proposal of one party has been unqualifiedly and unconditionally accepted by the other party, and the acceptance has been signified by some proper act, so that neither party can recede without liability.¹²⁵ The words used in an application are given their ordinary and usual meaning, and the construction is the same as that of a policy.¹²⁶

Whether an application is a part of a policy subsequently executed and delivered to an insured must be determined from an inspection and construction of the policy itself. The question is often of vital importance in cases where there is an issue as to fraud, concealment, or misrepresentation by the

Northwestern Mut. Relief Ass'n, 78 Wis. 463; *Lovick v. Providence Life Ass'n*, 110 N. C. 93; *Lindsey v. Western Mut. Aid Soc.*, 84 Iowa. 734, 50 N. W. 29. The privilege of reinstatement according to the provisions of a policy is a substantial right, of which an insured cannot be deprived by any subsequent by-law not expressly authorized by the contract. *Sieverts v. National Benev. Ass'n*, 95 Iowa, 710, 64 N. W. 671.

¹²⁵ *Chamberlain v. Prudential Ins. Co. (Wis.)*, 85 N. W. 128; ante, §§ 40-42.

¹²⁶ *Mobile Life Ins. Co. v. Walker*, 58 Ala. 290; *Chamberlain v. Prudential Ins. Co.*, supra. See "Construction of Policy."

insured, or his breach of a warranty, representation or condition. More especially is this true in life insurance, where the applications are usually forwarded to the home office of the insurer, and acceptance or rejection is based chiefly upon the statements of the applicant. The fact that acceptance is an act of the insurer who prepares the policy and has the opportunity in preparing the policy to say whether or not the application shall be a part of it has led to the adoption of the rule that the application is only a part of the final contract when incorporated into it or attached to it, or included either expressly or by necessary implication. But when the application is a part of the contract all its terms, conditions, statements and representations are entitled to as much consideration as if set out in full upon the face of the policy.¹²⁷ The presumption is that the person who signs an application for insurance knows and indorses its contents.¹²⁸ The errors and mistakes of the agent in writing down the answers given by the applicant are chargeable to the insurer unless the acts of the agent are sanctioned by the applicant.¹²⁹ In so far as an applicant assumes to answer questions asked him by

¹²⁷ Ante, §§ 40-46; post, c. 11, "Warranties and Representations." *Missouri, K. & T. Trust Co. v. German Nat. Bank (C. C. A.)*, 77 Fed. 117; *Rogers v. Phoenix Ins. Co.*, 121 Ind. 570; *Reynolds v. Atlas Acc. Ins. Co.*, 69 Minn. 93, 71 N. W. 831; *Vilas v. New York Cent. Ins. Co.*, 72 N. Y. 590.

The warranties and stipulations in an application are embraced in a provision in a benefit certificate making part of the contract "the statements" made by the insured in his application. *Foley v. Royal Arcanum*, 151 N. Y. 196; *Kelley v. Mutual Life Ins. Co.*, 75 Fed. 637.

¹²⁸ *Hartford L. & A. Ins. Co. v. Gray*, 80 Ill. 28, 91 Ill. 159.

¹²⁹ *Rissler v. American Cent. Ins. Co.*, 150 Mo. 366, 51 S. W. 755; *Ames v. Manhattan Life Ins. Co.*, 40 App. Div. 465, 58 N. Y. Supp. 244; *Fletcher v. New York Life Ins. Co.*, 4 McCrary, 440, 14 Fed. 846; *Marston v. Kennebec Mut. Life Ins. Co.*, 89 Me. 266, 36 Atl. 389.

the insurer he must answer fairly, fully and honestly. He is not required to volunteer information.¹³⁰ If a question asked is ambiguous, so that it might be misunderstood by an applicant, it is not error to allow him to testify, upon trial of an action on the policy, as to his understanding of the question when he answered it.¹³¹

¹³⁰ See post, c. 11, "Warranties and Representations."

¹³¹ Mutual Mill Ins. Co. v. Gordon, 121 Ill. 366.

CHAPTER V.

THE CONTRACT (*Continued*),—CONSTITUENTS.

§ 53. In General.

54. Oral Contract to Issue Policy.

55. The *Lex Loci*.

56. Custom and Usage.

57. Application.

58. Indorsements.

59. Mutual Organizations.

60. — Amendments to Charters and By-laws.

61. — Consent of Members to Same.

62. — Amendments Must be Reasonable.

IN GENERAL.

§ 53. The policy, when issued and accepted, constitutes the only contract of the parties concerning the matters mentioned therein. Other papers are often included in the policy by express reference or by implication so that they form a part of it.

After the terms of an insurance contract have been reduced to writing, signed by one party and accepted by the other, with the mutual understanding that it is then complete and operative, neither party can abandon that instrument and resort to the negotiations which were preliminary to its execution for the purpose of ascertaining what the contract is. All antecedent and contemporaneous negotiations and verbal statements appertaining to the subject matter of the written contract are merged and excluded when the parties assent to a written instrument as expressing their agreement.¹

¹ *Fowler v. Metropolitan Life Ins. Co.*, 116 N. Y. 389, 5 L. R. A. 805; *New York Life Ins. Co. v. McMaster's Adm'r*, 57 U. S. App. 638, 87 Fed. 63; *Union Mut. Life Ins. Co. v. Mowry*, 96 U. S. 544. See ante, §§ 36-39.

Thus parol agreements for the future cannot be shown; and a prior verbal agreement between insured and the agent of the insurer, that a policy for a stated time should be kept renewed, is of no effect if not contained in the policy when executed.² Subsequent promises or agreements of the insurer, not resting upon a new consideration, do not enter into the original contract.³ The holder of a policy is conclusively presumed to have knowledge of its contents, and in the absence of proof of fraud to have assented thereto.⁴ And the beneficiary is bound by all the valid conditions;⁵ and both are bound by the contents of an application attached to and forming part of the policy.⁶

ORAL CONTRACT TO ISSUE POLICY.

§ 54. The oral promise of an insurer to issue a policy binds it to execute one in the usual form and with the usual conditions.

Upon an oral contract of insurance, where nothing is said about conditions, if a policy is to be issued, the parties are presumed to intend that it shall contain the conditions usually inserted in policies of insurance in like cases, or as

² *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 609; *Hearn v. Equitable Safety Ins. Co.*, 3 Cliff. 328, Fed. Cas. No. 6,299; *Giddings v. Phoenix Ins. Co.*, 90 Mo. 272; *Mecke v. Life Ins. Co.*, 8 Phila. 6, 3 Bigelow, Life & Acc. Rep. 747.

³ *Knickerbocker Life Ins. Co. v. Heidel*, 8 Lea (Tenn.), 488; ante, §§ 36-39.

⁴ *Condon v. Mutual R. F. L. Ass'n*, 89 Md. 99, 42 Atl. 944, 44 L. R. A. 149; *New York Life Ins. Co. v. McMaster's Adm'r*, 57 U. S. App. 638, 87 Fed. 63; *Brown v. United States Casualty Co.*, 88 Fed. 38; *Wilkins v. State Ins. Co.*, 43 Minn. 177. Compare *Miotke v. Milwaukee Mechanics' Ins. Co.*, 113 Mich. 166, 71 N. W. 463.

⁵ *Donald v. Chicago, B. & Q. Ry. Co.*, 93 Iowa, 284, 33 L. R. A. 492; *Wheeler v. Odd Fellows' Mut. Aid & Acc. Ass'n*, 44 Minn. 513.

⁶ *Reynolds v. Atlas Acc. Ins. Co.*, 69 Minn. 93, 71 N. W. 831; *Wheeler v. Odd Fellows' Mut. Aid & Acc. Ass'n*, 44 Minn. 513; *Johnson v. Dakota F. & M. Ins. Co.*, 1 N. D. 167, 45 N. W. 799.

have been before used by the parties. That a particular condition is usual must be shown by the party who alleges it.⁷ The acceptance of a policy after a loss covered by an oral contract of insurance is not conclusive proof as to the terms of the original agreement but is evidence of an admission by the insured that it contained the terms agreed on.⁸ And likewise where a binding slip has been issued as evidence of temporary insurance till a policy can be prepared.⁹ Preliminary negotiations will be construed in connection with such form of policy as may be prescribed by the law-making body.¹⁰ It has been held that where an insurer denies the making of any preliminary contract, it cannot demand compliance by the insured with conditions which would have been contained in a policy if one had been issued;¹¹ but the better rule is that the party who seeks to take advantage of a contract must take it *cum onere*, and is bound by all the conditions and stipulations which form a part of it.¹²

THE LEX LOCI.

§ 55. The law of the place where a contract is made enters into and forms an essential part of every contract.

Whatsoever the law of the state where the contract is made declares with respect to the subject matter of the contract

⁷ Smith v. State Ins. Co., 64 Iowa, 716; ante, §§ 30-33.

⁸ Salisbury v. Hekla Fire Ins. Co., 32 Minn. 458.

⁹ Lipman v. Niagara Fire Ins. Co., 121 N. Y. 454, 8 L. R. A. 719; Edwards v. Mississippi Valley Ins. Co., 1 Mo. App. 192; De Grove v. Metropolitan Ins. Co., 61 N. Y. 594; Karelsen v. Sun Fire Office of London, 122 N. Y. 545.

¹⁰ Hicks v. British American Assur. Co., 162 N. Y. 284, 48 L. R. A. 424.

¹¹ Gold v. Sun Ins. Co., 73 Cal. 216; Campbell v. American Fire Ins. Co., 73 Wis. 100; American Cent. Ins. Co. v. Simpson, 43 Ill. App. 98.

¹² Hicks v. British American Assur. Co., 162 N. Y. 284, 48 L. R. A. 424. See post, c. 13, "Proofs of Loss;" Barre v. Council Bluffs Ins. Co., 76 Iowa, 609, 41 N. W. 373.

or annexes as the incident of the contract, whether granting a privilege or announcing a prohibition, is as much part and parcel of the contract as though written therein or indorsed thereon. All statutory laws in existence at the place of the making of the contract are necessarily contemplated and included in the contract and no contract can change the law. And because the Constitution of the United States prohibits these states from passing any law impairing the obligation of contracts it is not competent for a legislature to destroy the protecting provisions of a statute which relates not merely to the remedy but enters into the consideration and becomes a constituent part of every policy of insurance by a subsequent repeal of the statute.

"The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made. These are necessarily referred to in all contracts and form a part of them as the measure of obligation to perform them by the one party and the right acquired by the other. * * * If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution."¹³

¹³ *McCracken v. Hayward*, 2 How. (U. S.) 612; *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822; *Haynie v. Knights Templars & M. Life Ind. Co.*, 139 Mo. 416; *Jarman v. Knights Templars & M. Life Ind. Co.*, 95 Fed. 70. "It is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively. And some of the states have deemed it just and wise to forbid such laws altogether, by their constitutions." *Cooley, Const. Lim.* (5th Ed.) 456; *Oshkosh Gas Light Co.*

But where the right of a party to avoid a contract on the ground of a statutory enactment based upon the declared public policy of the state, pertains rather to the remedy than an essential element of the contract inducing its execution, it may by subsequent act of the legislature be entirely taken away and the parties remitted to the terms of the contract as expressed on its face.¹⁴

When a fire insurance policy is written on property within the corporate limits of a city, all the ordinances of such city which affect the rights of the parties in case of a loss under the policy, become a part of the contract, binding upon both insurer and insured; and in so far as they are applicable, such ordinances govern and control in the adjustment and settlement of a loss covered by the contract.¹⁵

CUSTOM AND USAGE.

§ 56. And so with a common and universal custom or usage which is not at variance with the terms of the contract or in opposition to law.¹⁶

APPLICATION.

§ 57. The application is a part of the contract when incorporated therein, or attached thereto, or expressly referred to and included.¹⁷

v. Germania Fire Ins. Co., 71 Wis. 454, 37 N. W. 819; Lindsey v. Western Mut. Aid Soc., 84 Iowa, 734, 50 N. W. 29; Germania Life Ins. Co. v. Peetz (Tex. Civ. App.), 47 S. W. 687; Fidelity & Casualty Co. v. Loewenstein, 97 Fed. 17, 46 L. R. A. 450; Rosenplanter v. Provident Sav. Life Assur. Soc., 96 Fed. 721, 46 L. R. A. 473; Central Bank of Washington v. Hume, 128 U. S. 195; Hicks v. British America Assur. Co., 162 N. Y. 284, 48 L. R. A. 424; Connecticut Mut. Life Ins. Co. v. Cushman, 108 U. S. 51; Roberts v. Winton, 100 Tenn. 484, 41 L. R. A. 275; ante, "The Standard Policy."

¹⁴ Ewell v. Daggs, 108 U. S. 143, 2 Sup. Ct. 408.

¹⁵ Larkin v. Glens Falls Ins. Co., 80 Minn. 527, 83 N. W. 410; Fire Association v. Rosenthal, 108 Pa. St. 474.

¹⁶ Ante, c. III; Walls v. Bailey, 49 N. Y. 464; Howard v. Great Western Ins. Co., 109 Mass. 384. See "Evidence."

¹⁷ Ante, §§ 51, 52. See, also, "Warranties."

INDORSEMENTS.

§ 58. Indorsements on a policy are usually part of the policy.

Where the body of a policy refers to annexed conditions, such conditions printed on the back of the policy, though unsigned, are a part of the contract;¹⁸ memoranda and marginal clauses relating to the subject matter or conditions, made prior to delivery, form a part of the instrument if such appears to have been the purpose and intention of making them.¹⁹

Other Papers.

Any paper may by proper reference and inclusion be made a part of the policy, as, for instance, a premium note,²⁰ or a preliminary survey;²¹ or a rider containing an "iron safe"

¹⁸ Kensington Nat. Bank v. Yerkes, 86 Pa. St. 227; Gauthier v. Canadian Mut. Ins. Co., 29 Up. Can. C. P. 593; Alabama Gold Life Ins. Co. v. Thomas, 74 Ala. 578.

¹⁹ Graham v. Stevens, 34 Vt. 166; Patch v. Phoenix Mut. Life Ins. Co., 44 Vt. 481; Pierce v. Charter Oak Life Ins. Co., 138 Mass. 151; Cowles v. Continental Life Ins. Co., 63 N. H. 300; Guerlain v. Columbian Ins. Co., 7 Johns. (N. Y.) 527; Wright v. Mutual Ben. Life Ass'n, 118 N. Y. 237; Mead v. Northwestern Ins. Co., 7 N. Y. 530. Not a part, Planters' Mut. Ins. Co. v. Rowland, 66 Md. 236; Mullaney v. National F. & M. Ins. Co., 118 Mass. 393; Bassell v. American Fire Ins. Co., 2 Hughes, 531, Fed. Cas. No. 1,094. See, also, Alabama Gold Life Ins. Co. v. Thomas, 74 Ala. 578; Ferrer v. Home Mut. Ins. Co., 47 Cal. 416; Girard Life Ins. Annuity & Trust Co. v. Mutual Life Ins. Co., 97 Pa. St. 15; Grandin v. Rochester German Ins. Co., 107 Pa. St. 26; Stone's Adm'rs v. United States Casualty Co., 34 N. J. Law, 371; Kingsley v. New England Mut. Fire Ins. Co., 8 Cush. (Mass.) 393.

²⁰ Schultz v. Hawkeye Ins. Co., 42 Iowa, 239; American Ins. Co. v. Stoy, 41 Mich. 385. Compare American Ins. Co. v. Gallagher, 75 Ind. 168.

²¹ Steward v. Phoenix Fire Ins. Co., 5 Hun (N. Y.), 261.

clause;²² or a rider containing a mortgage clause;²³ but outside papers must be imported in such a manner as to leave no doubt of the intention of the parties.²⁴ Thus a prospectus of a life insurance company, not annexed to a policy nor included by reference, cannot affect, nor vary, nor modify the strict terms of the policy itself.²⁵ It is not made a part of the policy by an indorsement on the policy that it may be had *gratis*.²⁶ It has been held that pamphlets sent out by an insurance company, and containing representations as to the plans upon which the company insures, may be considered in determining the meaning of the policy,²⁷ or even what the contract is;²⁸ but however important they might be in an action brought by an insured to rescind the contract upon the grounds of misrepresentation in its procuring it "would be impossible to sustain the claim that the statements and representations contained in the pamphlet issued by the company were to be regarded as affecting or modifying the strict terms of the policy without disregarding the established rule

²² Crigler v. Standard Fire Ins. Co., 49 Mo. App. 11; Keeley-Goodfellow Shoe Co. v. Liberty Ins. Co., 87 Tex. 112, 26 S. W. 1063, 8 Tex. Civ. App. 227, 28 S. W. 1027; American Fire Ins. Co. v. First Nat. Bank (Tex. Civ. App.), 30 S. W. 384. See Jackson v. British American Assur. Co., 106 Mich. 47, 30 L. R. A. 636 (and notes).

²³ Hastings v. Westchester Fire Ins. Co., 73 N. Y. 141; Westchester Fire Ins. Co. v. Coverdale, 48 Kan. 446; Phoenix Ins. Co. v. Omaha Loan & Trust Co., 41 Neb. 834, 25 L.R. A. 679.

²⁴ Goddard v. East Texas Fire Ins. Co., 67 Tex. 69, 60 Am. Rep. 1; Phoenix Ins. Co. v. Wilcox & G. Guano Co., 25 U. S. App. 201, 65 Fed. 724; Gunther v. Liverpool & L. & G. Ins. Co., 34 Fed. 501; City Ins. Co. v. Bricker, 91 Pa. St. 488.

²⁵ Fowler v. Metropolitan Life Ins. Co., 116 N. Y. 389, 5 L. R. A. 805; Ruse v. Mutual Ben. Life Ins. Co., 23 N. Y. 516, 24 N. Y. 653.

²⁶ Knickerbocker Life Ins. Co. v. Heidel, 8 Lea (Tenn.), 488.

²⁷ Bruce v. Continental Life Ins. Co., 58 Vt. 253.

²⁸ Smith v. St. Louis Mut. Life Ins. Co., 2 Tenn. Ch. 727; Southern Mut. Life Ins. Co. v. Montague, 84 Ky. 653.

of law that a written contract merges all prior and contemporaneous negotiations in reference to the same subject, and that the whole engagement of the parties and the extent and manner of their undertaking is embraced in the writing.”²⁹

MUTUAL ORGANIZATIONS.

§ 59. When a policy of insurance is effected in a mutual insurance company the insured becomes a member of the corporation, and is held to have notice of and is bound by all the provisions of its charter and by-laws as they then exist.

A policy holder in a mutual insurance company or association stands in a dual position and relation. He is both a policy holder and a member. He is alike insurer and insured, but in both capacities he is a member, and it is because he is a member that he occupies both of these positions. His liabilities as insurer and his rights as insured depend upon the obligations and conditions of his membership. These obligations and conditions are evidenced by the charter or articles of incorporation, by the constitution and by-laws of the association, and by his application for and certificate of membership, and by the law of the place of the contract.³⁰ The insured is presumed to have notice of the

²⁹ *Fowler v. Metropolitan Life Ins. Co.*, 116 N. Y. 389, 5 L. R. A. 805. See ante, note 1; *Fuller v. Metropolitan Life Ins. Co.*, 70 Conn. 647. Compare *Wood v. Dwarrris*, 11 Exch. 493, 2 Bigelow, Life & Acc. Rep. 418; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Higbee v. Guardian Mut. Life Ins. Co.*, 53 N. Y. 603.

³⁰ *Holland v. Supreme Council of C. F.*, 54 N. J. Law, 490; *Thibert v. Supreme Lodge K. of H.*, 78 Minn. 448, 81 N. W. 220; *Susquehanna Mut. Fire Ins. Co. v. Leavy*, 136 Pa. St. 499; *Lawler v. Murphy*, 58 Conn. 294, 8 L. R. A. 113; *American Ins. Co. v. Henley*, 60 Ind. 515; *Borgards v. Farmers' Mut. Ins. Co.*, 79 Mich. 440, 44 N. W. 856; *Donald v. Chicago, B. & Q. Ry. Co.*, 93 Iowa, 284, 33 L. R. A. 492; *Home Forum Ben. Order v. Jones*, 5 Okla. 598; *Railway P. & F. C. Mut. Aid & Ben. Ass'n v. Robinson*, 147 Ill. 138.

existence and contents of the charter and by-laws then in force from the date of his membership, and they are as binding upon both the member and the beneficiary or payee named in the certificate as is the certificate itself, even though they are not specifically incorporated into or referred to in the certificate.³¹ The rights of one who claims against an order through membership in one of its subsocieties, are subject to the provisions of the constitution of the subsociety to which he belongs.³² But a member is only bound by such rules, regulations and by-laws as have been properly enacted, and are not opposed to the organic law of the association, or contrary to public policy, or the established law of the land. When the terms of a policy and a by-law conflict, the former, if *intra vires*, controls.³³

SAME—AMENDMENTS TO CHARTER OR BY-LAWS.

§ 60. The holder of a certificate in a mutual benefit association is not affected by the adoption of new or the modification of existing by-laws without his consent.

³¹ Supreme Council of R. A. v. Brashears, 89 Md. 624, 43 Atl. 866; Cotter v. Grand Lodge A. O. U. W., 23 Mont. 82, 57 Pac. 650; Hass v. Mutual Relief Ass'n, 118 Cal. 6, 49 Pac. 1056; Barbot v. Mutual Reserve Fund Life Ass'n, 100 Ga. 681, 28 S. E. 498, and cases supra. See Kendrick v. Ray, 173 Mass. 305, 53 N. E. 823, as to effect upon creditor seeking to reach proceeds.

³² Polish Roman Catholic Union v. Warczak, 182 Ill. 27, 55 N. E. 64.

³³ Davidson v. Old People's Mut. Ben. Soc., 39 Minn. 303; Wiberg v. Minnesota S. R. Ass'n, 73 Minn. 301; Morrison v. Wisconsin Odd Fellows' Mut. L. Ins. Co., 59 Wis. 162, 18 N. W. 13; Luthe v. Farmers' Mut. Fire Ins. Co., 55 Wis. 543, 13 N. W. 490; Fry v. Charter Oak Life Ins. Co., 31 Fed. 197; Mutual Assur. Soc. v. Korn, 7 Cranch (U. S.), 396; Doane v. Millville Mut. M. & F. Ins. Co., 45 N. J. Eq. 274. See, also, Evans v. Trimountain Mut. Fire Ins. Co., 9 Allen (Mass.), 329; Hale v. Mechanics' Mut. Fire Ins. Co., 6 Gray (Mass.), 169; Brewer v. Chelsea Mut. Fire Ins. Co., 14 Gray (Mass.), 203; Sheldon v. Connecticut Mut. Life Ins. Co., 25 Conn. 207.

§ 61. The consent of the member is evidenced by his acceptance of a policy which in terms incorporates the charter and by-laws then in force or that may thereafter be enacted.

Since the provisions of the charter and by-laws of a mutual organization as they exist at the time of the issuing of a certificate to a member are an integral part of the contract between the parties, it follows that they cannot be subsequently changed at the will of the company without the consent of the insured. Any other holding would violate the well settled doctrine of contractual rights which necessitates the mutual assent of the contracting parties to the modification or alteration of an executory contract. Thus a change in a by-law extending the time for payment of a loss, unless pursuant to a reservation of the power in the insurer so to do, does not affect policies issued before it was adopted;³⁴ nor the enactment of a by-law creating a forfeiture,³⁵ or forbidding the assignment of certificates,³⁶ or reducing the classification and causes of total disability under an accident policy,³⁷ or creating new conditions precedent to reinstatement,³⁸ or in any other way affecting the rights or remedies of the member.³⁹ A contract

³⁴ *Morrison v. Wisconsin Odd Fellows' Mut. L. Ins. Co.*, 59 Wis. 162, 18 N. W. 13; *American Ins. Co. v. Stoy*, 41 Mich. 385.

³⁵ *Becker v. Farmers' Mut. Fire Ins. Co.*, 48 Mich. 610, 12 N. W. 874.

³⁶ *Wheeler v. Supreme Sitting, O. of I. H.*, 110 Mich. 437, 68 N. W. 229.

³⁷ *Starting v. Supreme Council, R. T. of T.*, 108 Mich. 440, 66 N. W. 340.

³⁸ *Sieverts v. National Benev. Ass'n*, 95 Iowa, 710, 64 N. W. 671.

³⁹ *Carnes v. Iowa State Travelling Men's Ass'n*, 106 Iowa, 281, 76 N. W. 683; *Supreme Lodge, K. of P., v. Stein*, 75 Miss. 107, 37 L. R. A. 775; *Mutual Aid & Instruction Soc. v. Monti*, 59 N. J. Law, 341, 36 Atl. 666; *Rosenberger v. Washington Mut. Fire Ins. Co.*, 87 Pa. St. 207; *Great Falls Mut. Fire Ins. Co. v. Harvey*, 45 N. H. 292; *Borgards v. Farmers' Mut. Ins. Co.*, 79 Mich. 440, 44 N. W. 856. Compare *Pain v. Societe St. Jean Baptiste*, 170 Mass. 319, 52 N. E. 502.

once made with a member cannot differ in its essence from one made with anyone else, and he cannot, without his consent, be brought into changed responsibilities which import new terms into the agreement itself. Whatever force unauthorized changes in the charter or by-laws, or the unauthorized adoption of new by-laws may have in regard to other matters, they will not be allowed to destroy express contracts against the will of the insured. But changes authorized by the charter or the legislative act by virtue of which the insurer is created, are authorized by the contract itself.

Whether or not the rights of a member are subject to modification by the subsequent changes in the by-laws or charter will depend upon the terms of the contract. If it provide that members shall be bound by all articles and by-laws then existing, or which may at any time be adopted, the company may subsequently alter or amend its by-laws and articles, and members will be thereby bound, for their consent thereto is given by accepting membership upon such terms, and conditions to this effect are valid. In such cases changes are made not in violation of the contract but in harmony with it. The acceptance of an insurance contract in the form of a certificate which recites that any violation of the "requirements of the laws now in force or hereafter enacted, governing the order or this clause, shall render this certificate null and void," and that a condition upon which it depends is "the full compliance with all the laws of the order now in force or that may hereafter be enacted," makes all such existing by-laws and those subsequently enacted during the life of the insured a part of the contract, binding alike upon the beneficiary and the member, and authorizes the adoption of a new by-law forfeiting the certificate if the insured should take his own life sane or insane,⁴⁰ or a by-law providing for forfeiture of

⁴⁰ Supreme Commandery, K. of G. R., v. Ainsworth, 71 Ala. 436;

membership of those who follow a prohibited occupation.⁴¹ And so where the change is pursuant to the general law of the domicile of the corporation which gives the right to alter or amend by-laws,⁴² for the parties will be presumed to have contracted with reference to such laws as in their direct or necessary legal operation controlled or affected the obligations of the contract.

A stipulation in the certificate that the member is bound by all the lawful "by-laws, rules and regulations of the association" relates only to those in existence when the contract is consummated and does not authorize the insurer to thereafter change the contractual rights of the insured.⁴³ As

Fullenwider v. Supreme Council, R. L., 180 Ill. 621, 54 N. E. 485; Daughtry v. Knights of Pythias, 48 La. Ann. 1203; Supreme Lodge, K. of P., v. Kutscher, 179 Ill. 340, 53 N. E. 620.

⁴¹ Loeffler v. Modern Woodmen, 100 Wis. 79, 75 N. W. 1012. See, also, Duer v. Supreme Council, O. of C. F., 21 Tex. Civ. App. 493, 52 S. W. 109; Supreme Council, A. L. of H., v. Adams, 68 N. H. 236, 44 Atl. 380; Connelly v. Masonic Mut. Ben. Ass'n, 58 Conn. 552, 9 L. R. A. 428; Supreme Lodge, K. of P., v. Trebbe, 179 Ill. 348; Pain v. Societe St. Jean Baptiste, 172 Mass. 319, 52 N. E. 502; Allen v. Life Ass'n of America, 8 Mo. App. 52; McKean v. Biddle, 181 Pa. St. 361; Hass v. Mutual Relief Ass'n, 118 Cal. 6, 49 Pac. 1056; Supreme Lodge, K. of P., v. La Malta, 95 Tenn. 157, 30 L. R. A. 838.

⁴² Stohr v. San Francisco M. F. Soc., 82 Cal. 557; Sargent v. Supreme Lodge, K. of H., 158 Mass. 557; ante, note 13. See, as to the right of a corporation to change its by-laws, when authorized by its charter, though it may affect the rights of stockholders, Schrick v. St. Louis Mut. House Bldg. Co., 34 Mo. 423; Northern R. Co. v. Miller, 10 Barb. (N. Y.) 283; Hyatt v. McMahon, 25 Barb. (N. Y.) 468; Currie's Adm'rs v. Mutual Assur. Co., 4 Hen. & M. (Va.) 315; Supreme Commandery, K. of G. R., v. Ainsworth, 71 Ala. 443. But causes of forfeiture cannot be added by new by-laws. Insurance Co. v. Connor, 17 Pa. St. 136; Beadle v. Chenango County Mut. Ins. Co., 3 Hill (N. Y.), 161; Great Falls Mut. Fire Ins. Co. v. Harvey, 45 N. H. 292.

⁴³ Sieverts v. National Benev. Ass'n, 95 Iowa, 710, 64 N. W. 671; McNeil v. Southern T. M. Relief Ass'n, 40 App. Div. 581, 58 N. Y. Supp. 119.

a member of an association one may be bound by new by-laws as applied to agreements made after their adoption, but not as to those already made.⁴⁴ In any event a member is only absolutely bound by such amendments or additions to the by-laws as are made by the proper law-making body of the association in proper form, after the required notice has been given, and after full compliance with the conditions prescribed in the existing charter and by-laws;⁴⁵ yet he may by his silence assent to, or by his conduct ratify so that he will thereafter be estopped to object to, a change in the terms of his contract which would not otherwise have been binding upon him.⁴⁶

AMENDMENT MUST BE REASONABLE.

§ 62. Provisions of a contract binding a member to comply with both existing and subsequently enacted by-laws, etc., are subject to the implied condition that any changes thereafter made in the contract by the act of the insurer shall be reasonable.

In ordinary cases one who has consented to become a member of a voluntary association subject to the charter and by-laws then in force and which may be thereafter enacted or adopted, will be bound by his agreement and will not be heard to complain that its terms are harsh or inequitable. New by-laws, or amendments to old ones, fairly and honestly enacted by the association in accordance with its

⁴⁴ *Hobbs v. Iowa Mut. Ben. Ass'n*, 82 Iowa, 107, 47 N. W. 983.

⁴⁵ *Morris v. Farmers' Mut. Fire Ins. Co.*, 63 Minn. 420, 65 N. W. 656; *Supreme Lodge, K. of P., v. Trebbe*, 179 Ill. 348; *Supreme Lodge, K. of P., v. Kutscher*, 179 Ill. 340, 53 N. E. 620; *Marten v. Mutual Fire Ins. Co.*, 45 Md. 51; *Supreme Lodge, K. of P., v. La Malta*, 95 Tenn. 157, 30 L. R. A. 838; *Supreme Lodge, K. of P., v. Stein*, 75 Miss. 107, 37 L. R. A. 775, 21 So. 559.

⁴⁶ *Borgards v. Farmers' Mut. Ins. Co.*, 79 Mich. 440, 44 N. W. 856; *Thibert v. Supreme Lodge, K. of H.*, 78 Minn. 448, 81 N. W. 220, 47 L. R. A. 136.

rules, and not contrary to public policy or the law of the land, are usually binding upon its members. The courts will not interfere except where substantial property rights are involved, and then only to ascertain whether or not the proceedings were reasonable and conducted pursuant to and in accordance with the rules and laws of the society, whether they were taken in good faith or maliciously and *mala fide*, whether they were contrary to public policy or the established law, and sometimes whether they were contrary to natural justice.⁴⁷

Where there is a reservation of the right to amend the by-laws, each member is bound to take notice of the existence and effect of that power. He has no right to presume that the by-laws will remain unchanged. "The duly chosen and authorized representatives of the members are vested with the power of determining when a change is demanded, and with their discretion courts cannot interfere. * * * It is only when there is an abuse of discretion and a clear, unreasonable and arbitrary invasion of private rights, that courts will assume jurisdiction." They will "compel adherence to the charter and to the purpose for which the society was organized, but they will not do more. * * * To justify interference by the courts, and warrant the overthrow of by-laws enacted in the mode prescribed by the by-laws, it must be shown that there was an abuse of power, or that the later by-law is unreasonable."⁴⁸ While the courts will not control

⁴⁷ Connelly v. Masonic Mut. Ben. Ass'n, 58 Conn. 552, 9 L. R. A. 428; Hopkinson v. Marquis of Exeter, L. R. 5 Eq. 66; Lambert v. Addison, 46 Law T. (N. S.) 20, 25 Alb. Law J. 418; Mead v. Stirling, 62 Conn. 586, 23 L. R. A. 227; Failey v. Fee, 83 Md. 83, 32 L. R. A. 311.

⁴⁸ Supreme Lodge, K. of P., v. Knight, 117 Ind. 489, 3 L. R. A. 409; Allnutt v. Subsidiary High Court, A. O. of F., 62 Mich. 110; Crossman v. Massachusetts Ben. Ass'n, 143 Mass. 435.

the exercise of discretionary powers, or direct the course of an action in matters of expediency or policy, they will not allow a benefit society by changing its by-laws to arbitrarily repudiate a policy of insurance, or to destroy a vested right, or to seriously impair the contractual rights of a member by any arbitrary or unreasonable exercise of power.⁴⁹ In a recent case in Minnesota, the question was as to the validity of a by-law taking away from a member the right to a written or printed notice of assessments, and substituting a notice published in a newspaper with a provision that failure to get the notice should not relieve a member from the suspension consequent upon non-payment of the assessments. The court said: "It is possible that, as an original by-law, a provision of this character would be held reasonable and operative on the ground that, if persons chose to become members of an association with such drastic rules, theirs was the right so to do. But this was not the law when the plaintiff united with his lodge. The question is not as to the reasonableness of a by-law in force when he cast his fortunes with the order, but it is as to the reasonableness of a change in a by-law after he became a member, and of which it was not shown that he had any personal knowledge. In fact it has been held that provisions for forfeitures in the original by-laws of mutual benefit societies, without providing for notice or giving an opportunity to be heard, are void because unreasonable. * * * The rights of members in these associations must, of course, depend upon the articles or by-laws to which all members assent when becoming such; and, generally speaking, the same body which is authorized to make by-laws can

⁴⁹ *Jarman v. Knights Templars' & M. Life Ind. Co.*, 95 Fed. 70; *Supreme Council, L. of H., v. Adams*, 68 N. H. 236, 44 Atl. 380; *Supreme Tert, K. of M., v. Hammers*, 81 Ill. App. 560. Compare *Pain v. Societe St. Jean Baptiste*, 172 Mass. 319, 52 N. E. 502.

change, amend, or repeal those already made; and to this plaintiff agreed when he joined. But changes, amendments and repeals are subject to the restrictions and limitations of the by-laws themselves as well as those of the charter or articles of association, and are also subject to the implied condition of being reasonable. * * * We are compelled to hold that a change or amendment to the by-law in force when plaintiff entered the association whereby it was incumbent upon the reporter of his lodge to give him notice of assessments, if or a greater or less number than two, which deprived him of all right to any notice, either directly or indirectly, by means of a provision rendering a failure to give notice as determined upon by his lodge wholly immaterial, was a vitally important change, and, as to him, unreasonable and void.”⁵⁰ And similarly it has been held by a federal court that a provision in a contract subjecting the rights of a member in a society to the rules and regulations then existing or as they might be changed, does not authorize the society to change its rules so as to deprive the members of part of the benefits guaranteed him by his policy.⁵¹

⁵⁰ Thibert v. Supreme Lodge, K. of H., 78 Minn. 448, 81 N. W. 220, 47 L. R. A. 136.

⁵¹ Jarman v. Knights Templars' & M. Life Ind. Co., 95 Fed. 70, 53 Cent. L. J. 391.

CHAPTER VI.

THE CONTRACT (*Continued*)—INTERPRETATION.

§ 63. General Principles of Construction.

64. Intent of the Parties Important.

65. Ambiguities.

66. Restrictions and Forfeitures.

67. Writing Controls Print.

68. The Law of the Place.

69. Custom and Usage.

70. Standard Policies.

71. Policies of Mutual Organizations.

GENERAL PRINCIPLES OF CONSTRUCTION.

§ 63. Insurance contracts are to be interpreted by rules applicable to other contracts, and to be enforced in accordance with the expressed intention of the parties.

It has been fitly said that common sense and a desire to promote and enforce good faith should be the chief guides in the interpretation of contracts. Policies of insurance are presumed to contain the complete engagements of both insurer and insured in regard to the subject matters embraced in them. They, like all other contracts, must be construed according to the intention of the parties as manifested by the words used and according to their ordinary signification. When words are used which have an usual and common acceptance they will be given their plain, natural and obvious meaning, unless it affirmatively and clearly appears that they were not intended to have such meaning. Courts cannot make contracts for parties, or render a party liable on a different basis from that upon which his liability was stipu-

lated for.¹ It is the duty of the court in all cases where the question is simply the determination of the meaning of a written document, to declare its legal interpretation; and it is error to leave its construction to a jury.² But where the contract relates to matters or business of a technical character, and contains terms or words having a technical or peculiar application and meaning in such matters or business, resort may be had to the testimony of experts or those acquainted with the particulars to which the terms and words relate, and where such testimony is conflicting, the question of the meaning of such terms and words may be referred to a jury.³

In case of ambiguity that construction should be given which will give the policy effect rather than that which will make it void.⁴ Having indemnity for their object, policies will be liberally construed to that end. Hence a liberal construction, if it is a reasonable one and will prevent injustice, should be adopted when a literal construction would

¹Foot v. Aetna Life Ins. Co., 61 N. Y. 571; O'Neil v. Pleasant Prairie Mut. Fire Ins. Co., 71 Wis. 621, 38 N. W. 345; Mississippi Mut. Ins. Co. v. Ingram, 34 Miss. 215; Goodrich v. Treat, 3 Colo. 408; Supreme Council, R. T. of T., v. Curd, 111 Ill. 284. In Walsh v. Hill, 38 Cal. 481, the court said: "In the construction of written instruments, we have never derived much aid from the technical rules of the books. The only rule of much value—one which is frequently shadowed forth, but seldom, if ever, expressly stated in the books—is to place ourselves as near as possible in the seats which were occupied by the parties at the time the instrument was executed; then, taking it by its four corners, read it."

²Dwight v. Germania Life Ins. Co., 103 N. Y. 341; Johnson v. Northwestern Nat. Ins. Co., 39 Wis. 87; Thurston v. Burnett & B. D. F. Mut. Fire Ins. Co., 98 Wis. 476, 74 N. W. 131.

³Whitmarsh v. Conway Fire Ins. Co., 16 Gray (Mass.), 359; Home Mut. Ins. Co. v. Roe, 71 Wis. 33, 36 N. W. 594.

⁴Harper v. Albany Mut. Ins. Co., 17 N. Y. 194.

lead to manifest injustice.⁵ The whole contract, whether composed of one or several instruments, must be read and construed together, and indorsements referred to may be considered in arriving at their meaning;⁶ where words used are in their import equivocal, reference may be had to the subject matter and the circumstances surrounding and connected with the procuring of the policy;⁷ and parol evidence is admissible to establish a fact collateral to the written contract.⁸ An insurer is presumed to know what is obvious in regard to the property insured.⁹ Unless the language used excludes the presumption, a policy of fire insurance must be presumed to have been made with reference to the nature and character of the property insured, and to the owner's use of it in the ordinary manner, and for the purposes for which such property is ordinarily held and used.¹⁰ If reading a policy in connection with the subject matter and surrounding circumstances, and giving to the language used its ordinary and natural meaning, the intention of the parties becomes manifest such intention must prevail; and when a reasonable

⁵ *Mauger v. Holyoke Mut. Fire Ins. Co.*, 1 Holmes, 287, Fed. Cas. No. 9,305; *Miller v. Insurance Co.*, 12 W. Va. 116; *Matthews v. American Cent. Ins. Co.*, 154 N. Y. 449, 39 L. R. A. 433; *Brink v. Merchants' & Mechanics' Ins. Co.*, 49 Vt. 442; *State Ins. Co. v. Hughes*, 10 Lea (Tenn.), 461; *Teutonia Fire Ins. Co. v. Mund*, 102 Pa. St. 89.

⁶ *St. Clair County Benev. Soc. v. Fietsam*, 97 Ill. 474; post, § 64; ante, § 58.

⁷ *Haws v. Philadelphia Fire Ass'n*, 114 Pa. St. 431; *Monroe B. & L. Ass'n v. Liverpool & L. & G. Ins. Co.*, 50 La. Ann. 1243, 24 So. 238; *Kenyon v. Knights Templar & M. Mut. Aid Ass'n*, 122 N. Y. 247; *Voss v. Connecticut Mut. Life Ins. Co.*, 119 Mich. 161, 77 N. W. 697; *Teutonia Fire Ins. Co. v. Mund*, 102 Pa. St. 89.

⁸ *Planters' Mut. Ins. Co. v. Deford*, 38 Md. 382.

⁹ *Hey v. Guarantors' Liability Ind. Co.*, 181 Pa. St. 220.

¹⁰ *Boright v. Springfield F. & M. Ins. Co.*, 34 Minn. 353; *Holbrook v. St. Paul F. & M. Ins. Co.*, 25 Minn. 229.

construction can be placed upon the words themselves without resorting to extrinsic evidence, such evidence is inadmissible.¹¹

An insurer which continues to use a form of policy that has been uniformly construed by the highest courts of the state which granted its charter and by other courts of last resort, will be presumed to have contracted with that construction in view.¹² A policy renewed from year to year will be construed in respect to the condition of the property at the date of the last renewal.¹³ A life insurance policy is held to be a single and entire contract commencing with its issuance, continuing during the life of the insured or the time stated, and subject to breach or discontinuance for violation or nonperformance of its conditions.¹⁴ In so far as it evidences the intention of the insured to dispose of the proceeds of the insurance it is in the nature of a will.¹⁵ Conditions and limitations, or words of exception will be rigidly construed, and if capable of two meanings, will be given that one which is most favorable to the insured;¹⁶ but a special clause which creates an exception to a general one, governs the latter when the meaning is clear.¹⁷ Stipulations

¹¹ *Johnson v. Northwestern Nat. Ins. Co.*, 39 Wis. 87; *Foot v. Aetna Life Ins. Co.*, 61 N. Y. 571; *De Graff v. Queen Ins. Co.*, 38 Minn. 501; *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472; *West v. Citizens' Ins. Co.*, 27 Ohio St. 1; *Baltimore Fire Ins. Co. v. Loney*, 20 Md. 36.

¹² *Fidelity & Casualty Co. v. Loewenstein (C. C. A.)*, 97 Fed. 17, 46 L. R. A. 450, 88 Fed. 474.

¹³ *Garrison v. Farmers' Mut. Fire Ins. Co.*, 56 N. J. Law, 235, 28 Atl. 8.

¹⁴ *Fearn v. Ward*, 80 Ala. 555; *Goodwin v. Provident Sav. L. Assur. Soc.*, 97 Iowa, 226, 32 L. R. A. 473.

¹⁵ *Chartrand v. Brace*, 16 Colo. 19, 12 L. R. A. 209.

¹⁶ *Fidelity & Casualty Co. v. Chambers*, 93 Va. 138, 24 S. E. 896; *Burkard v. Travellers' Ins. Co.*, 102 Pa. St. 262.

¹⁷ *Mitchell Furniture Co. v. Imperial Fire Ins. Co.*, 17 Mo. App. 627; *Grandin v. Rochester German Ins. Co.*, 107 Pa. St. 26.

which relate merely to the procedure after a loss will be reasonably and not rigidly construed.¹⁸ The assertions, promises, representations, or construction of an agent cannot prevail over the plain and unambiguous provisions of a policy.¹⁹

The practical interpretation of an agreement by the parties to it is always a consideration of great weight.²⁰ Punctuation is an uncertain aid to construction. "It may be resorted to when other means fail; but the court will take the instrument by its four corners in order to ascertain its meaning. If that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it." The words control the punctuation marks and not the punctuation marks the words.²¹

INTENT OF PARTIES.

§ 64. A policy should, if possible, be so construed as to carry out the object and intent of the parties; but purpose or intent cannot supersede the plain and unambiguous language of the policy. The intention of the parties as gathered from the whole contract must control.

The performance of a contract should be such as is required by the spirit and meaning of the contract, and the intention of the parties as expressed therein. When it is possible to determine from a policy upon what terms the minds of the parties met, the courts must interpret

¹⁸ *Paltrovitch v. Phoenix Ins. Co.*, 143 N. Y. 73, 25 L. R. A. 198.

¹⁹ *Quinlan v. Providence W. Ins. Co.*, 133 N. Y. 360; *Chamberlain v. Prudential Ins. Co. (Wls.)*, 85 N. W. 128; *Wilkins v. State Ins. Co.*, 43 Minn. 177; *Lycoming Fire Ins. Co. v. Langley*, 62 Md. 196; post, c. 8, "Agents."

²⁰ *Brooklyn Life Ins. Co. v. Dutcher*, 95 U. S. 269.

²¹ *Boright v. Springfield F. & M. Ins. Co.*, 34 Minn. 353; *Ewing's Lessee v. Burnet*, 11 Pet. (U. S.) 41; *Holmes v. Phoenix Ins. Co.*, 98 Fed. 240, 47 L. R. A. 308.

and give effect to the policy according to the intent thereby evidenced. When the language of the policy is obscure, resort may be had to the nature and subject matter of the risk and the circumstances surrounding the procuring and issuing of the policy, for the purpose of discovering what the actual purpose and intent of the parties was. But an unexpressed intent cannot contradict, vary, or control the clear intent of the parties as expressed in the writings which they have deliberately executed. The question then is not what the parties intended, but what means the language they have employed.²² When the contract has been partly executed, there is no surer way to find out what the parties meant than to see what they have done.²³

AMBIGUITIES.

§ 65. When the language of a policy is ambiguous, it is taken most strongly against the insurer.

If there is a seeming inconsistency between different provisions of a policy a court will endeavor to give effect to both; but if the meaning is ambiguous, or if the policy is so drawn as to require interpretation and to be fairly susceptible of two

²² *Merchants' Mut. Ins. Co. v. Lyman*, 15 Wall. (U. S.) 664; *Union Mut. Life Ins. Co. v. Mowry*, 96 U. S. 544; *Quinlan v. Providence W. Ins. Co.*, 133 N. Y. 360; *Foot v. Aetna Life Ins. Co.*, 61 N. Y. 571; *Wells, Fargo & Co. v. Pacific Ins. Co.*, 44 Cal. 397; *Blinn v. Dresden Mut. Fire Ins. Co.*, 85 Me. 389; *Montgomery v. Firemen's Ins. Co.*, 16 B. Mon. (Ky.) 427; *The Sydney*, 27 Fed. 119; *Johnson v. Northwestern Nat. Ins. Co.*, 39 Wis. 87; *Schreiber v. German American H. Ins. Co.*, 43 Minn. 367; *St. Nicholas Ins. Co. v. Merchants' Ins. Co.*, 11 Hun (N. Y.), 108; cases ante; *Supreme Council, R. T. of T., v. Curd*, 111 Ill. 284. Oral evidence admissible to show the "understanding," *Ganser v. Fireman's Fund Ins. Co.*, 38 Minn. 74.

²³ *Brooklyn Life Ins. Co. v. Dutcher*, 95 U. S. 269; *Ganser v. Fireman's Fund Ins. Co.*, 38 Minn. 74.

different constructions, the one will be adopted that is most favorable to the insured. This rule, recognized in all the authorities, is a just one, because the instrument is drawn by the insurer. It is its language which the court is invited to interpret, and it is reasonable that its own words should be construed most strongly against itself.²⁴ Courts are always reluctant to deprive an insured of the benefits of a policy by any narrow or technical construction of the conditions, or stipulations, or exceptions, which limit the scope of the liability of the insurer or impose upon the insured conditions precedent to his right to recover.²⁵ But this rule is only to be applied where there is doubt as to the intent of the parties and as to the meaning of the language used; and has no application where there is no ambiguity and no inconsistent or conflicting provisions.²⁶

RESTRICTIONS AND FORFEITURES.

§ 66. Conditions and stipulations whose meaning is doubtful will be so construed as to avoid, rather than to create, forfeitures, and against the one for whose benefit they were imposed.²⁷

²⁴ *Atlantic Ins. Co. v. Manning*, 3 Colo. 224; *Burkhard v. Travellers' Ins. Co.*, 102 Pa. St. 262; *Allen v. St. Louis Ins. Co.*, 85 N. Y. 473; *London Assurance v. Companhia de Moagens*, 167 U. S. 150; *Northwestern Mut. Life Ins. Co. v. Hazelett*, 105 Ind. 212; *Hardesty v. Forest City Ins. Co.*, 77 Ill. App. 413.

²⁵ *Burkheiser v. Mutual Acc. Ass'n (C. C. A.)*, 61 Fed. 816, 26 L. R. A. 112; *Burnett v. Eufaula Home Ins. Co.*, 46 Ala. 11; *Commercial Ins. Co. v. Robinson*, 64 Ill. 265; *Matthews v. American Cent. Ins. Co.*, 154 N. Y. 449, 39 L. R. A. 433; *State Ins. Co. v. Maackens*, 38 N. J. Law, 564; *Sergeant v. Liverpool & L. & G. Ins. Co.*, 155 N. Y. 349; *American Surety Co. v. Pauly*, 170 U. S. 133, 160; *Schroeder v. Trade Ins. Co.*, 109 Ill. 157.

²⁶ *Foot v. Aetna Life Ins. Co.*, 61 N. Y. 571; *Holmes v. Phenix Ins. Co. (C. C. A.)*, 98 Fed. 240, 47 L. R. A. 308; *Thurston v. Burnett & B. D. F. Mut. Fire Ins. Co.*, 98 Wis. 476, 74 N. W. 131.

²⁷ *Eastern R. Co. v. Relief Fire Ins. Co.*, 98 Mass. 420; *Martin v.*

WRITING CONTROLS PRINT.

§ 67. Where the written and printed portions of a policy conflict, the former control.

It frequently happens that special printed or written slips are attached to the body of the general form of policy used. For the purposes of construction, such special slips are to be regarded as part of what is known as the *written part* of the policy, which, as more clearly and immediately expressive of the intention of the parties, is allowed a controlling force in case of repugnancy between it and the agreements which (as applicable to policies in general) are found in what is termed the printed blank or form.²⁸ This is subject to the rule that words of exception are construed most strongly against the one for whose benefit they were intended.²⁹

THE LAW OF THE PLACE.

§ 68. The general rule is that the law of the place where a contract is made governs as to the nature, the obligation and the interpretation of it. The parties may stipulate for a different rule of construction.

Obligations in respect to the mode of their solemnization are subject to the rule *locus actum regit*; in respect to their interpretation, to the *lex loci contractus*; in respect to the mode of their performance to the law of the place of performance. Matters bearing upon the interpretation and va-

Manufacturers' Acc. Ind Co., 151 N. Y. 94; Piedmont & A. Life Ins. Co. v. Young, 58 Ala. 476; McNamara v. Dakota F. & M. Ins. Co., 1 S. D. 342, 47 N. W. 288; Griffey v. New York Cent. Ins. Co., 100 N. Y. 417; State Ins. Co. v. Maackens, 38 N. J. Law, 564.

²⁸ Mascott v. Granite State Fire Ins. Co., 68 Vt. 253; Fire Ins. Ass'n of England v. Merchants' & Miners' Transp. Co., 66 Md. 339; West Branch Lumberman's Exchange v. American Cent. Ins. Co., 183 Pa. St. 366; Phoenix Ins. Co. v. Taylor, 5 Minn. 492 (Gil. 393).

²⁹ Canton Ins. Office v. Woodside (C. C. A.), 90 Fed. 301.

lidity of a policy of insurance are to be determined by the law of the place where it is made unless the parties have stipulated otherwise. The remedies are to be governed by the law of the place where an action is brought. For purposes of construction it is always legitimate to consider the time when and the circumstances under which a contract was made, and the law under which it was made is one of these circumstances.³⁰ A policy made in one state, to be performed wholly or partially in another, is *prima facie* to be construed according to the laws of the former;³¹ but where the contracting parties belong to different states and it does not appear where it was made, or delivered, or payable, or where the premium was paid, the *locus* may be inferred to have been in either state.³²

The place of the making of a contract of insurance is the place where the final act is performed which is necessary to establish the relation of insurer and insured. Thus where an application is forwarded from Chicago to New York, and a policy returned containing a condition that it will not be binding until countersigned by an agent and until the advance premium is paid to the agent in Chicago, the contract is not complete until these conditions are complied with, and Chicago is the place of the contract;³³ and where the policy does not

³⁰ Mullen v. Reed, 64 Conn. 240, 24 L. R. A. 664; London Assur. v. Companhia De Moagens Do Barreiro, 167 U. S. 149, 17 Sup. Ct. 789; Union Cent. Life Ins. Co. v. Pollard, 94 Va. 146, 36 L. R. A. 271; State Mut. Fire Ins. Ass'n v. Brinkley Stave & Heading Co., 61 Ark. 1, 29 L. R. A. 712; Voorheis v. Peoples' Mut. Ben. Soc., 91 Mich. 469, 51 N. W. 1109.

³¹ Seamans v. Knapp-Stout & Co. Company, 89 Wis. 177, 27 L. R. A. 362.

³² Pennypacker v. Capital Ins. Co., 80 Iowa, 56, 8 L. R. A. 236.

³³ Pomeroy v. Manhattan Life Ins. Co., 40 Ill. 398; Mutual Life Ins. Co. v. Hill (C. C. A.), 97 Fed. 263; Giddings v. Northwestern Mut. Life Ins. Co., 102 U. S. 108.

become effectual until delivery, it must be construed according to the law of the place of delivery.³⁴ A constructive delivery, or mailing the policy to the insured, or delivery to one authorized to receive the policy for him, is often sufficient, and the place of completion is in such case the place where the insurer has done some act intended to signify that the instrument shall have immediate vitality, or has put the policy beyond its control.³⁵ Interest should be computed according to the law of the state where the policy is payable.³⁶ An assignment of a policy is subject to the law of the domicile of the assignor and assignee.³⁷ Policies issued upon applications

³⁴ *Continental Life Ins. Co. v. Webb*, 54 Ala. 688; *Heebner v. Eagle Ins. Co.*, 10 Gray (Mass.), 131; *In re Insurance Co. of Pennsylvania*, 22 Fed. 109; *In re Breitung*, 78 Wis. 33, 46 N. W. 891, 47 N. W. 17; *Cromwell v. Royal Canadian Ins. Co.*, 49 Md. 366. Compare *Bailey v. Hope Ins. Co.*, 56 Me. 474.

Policies issued by foreign companies, doing business in Massachusetts by virtue of its laws, to citizens thereof, are governed by the laws of the states in which the companies have their domicile, when the policies were executed there and the conditions thereof were to be performed there by the companies. In such cases the nonforfeiture law of Massachusetts does not apply. *Smith v. Mutual Life Ins. Co.*, 5 Fed. 582; *Desmazes v. Mutual Ben. Life Ins. Co.*, 7 Ins. Law J. 926; *Shattuck v. Mutual Life Ins. Co.*, 7 Ins. Law J. 937; *Whitcomb v. Phoenix Mut. Life Ins. Co.*, 8 Ins. Law J. 624. Contra, *Morris v. Penn Mut. Life Ins. Co.*, 120 Mass. 503; *Holmes v. Charter Oak Life Ins. Co.*, 131 Mass. 64. See, also, *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226; *Provident Sav. Life Assur. Soc. v. Hadley (C. C. A.)*, 102 Fed. 856. Compare *Cravens v. New York Life Ins. Co.*, 148 Mo. 583, 53 L. R. A. 305.

³⁵ Ante, § 47, "Delivery of Policy;" *Seamans v. Knapp-Stout & Co. Company*, 89 Wis. 177, 27 L. R. A. 362; *Northampton Mut. L. S. Ins. Co. v. Tuttle*, 40 N. J. Law, 476; *Marden v. Hotel Owners' Ins. Co.*, 85 Iowa, 584, 52 N. W. 509.

³⁶ *Grangers' Life Ins. Co. v. Brown*, 57 Miss. 308; *Merchants' & M. Ins. Co. v. Linchey*, 3 Mo. App. 588.

³⁷ *Connecticut Mut. Life Ins. Co. v. Westervelt*, 52 Conn. 586; *Lee v. Ably*, 17 Q. B. Div. 309; *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24.

forwarded to the home office of the insurer where they are passed upon and accepted, and whence the policies are issued, are governed by the law of the state where such office is, and are not affected by the statutes in effect at the residence of the insured in another state.³⁸ But in Wisconsin it is held that the provisions of the statutes of that state conclusively establishing the value of insured real property when wholly destroyed to be the amount of the insurance, applies to contracts made out of the state when the property is situated in that state.³⁹

A contract which in terms provides for the payment of premiums, and making of proof, and for performance by the insured, at its home office in New York, is to be construed as a New York contract.⁴⁰ The rights and liabilities of insurer and insured under a fire insurance policy, will be interpreted in connection with the ordinances of a city wherein the property covered was situated, when such ordinances were in effect both at the time of issuing the policy and at the time of a loss thereunder and have a direct bearing upon the terms of the policy.⁴¹ Decisions by courts of last resort construing

³⁸ *State Mut. Fire Ins. Co. v. Brinkley S. & H. Co.*, 61 Ark. 1, 29 L. R. A. 712. Compare *Seamans v. Knapp-Stout & Co. Company*, 89 Wis. 177, 27 L. R. A. 362; *Seiders v. Merchants' Life Ass'n*, 93 Tex. 194, 54 S. W. 753; *Seamans v. Temple Co.*, 105 Mich. 400, 28 L. R. A. 430.

³⁹ *Seyk v. Millers' Nat. Ins. Co.*, 74 Wis. 67, 3 L. R. A. 523.

⁴⁰ *Mutual Life Ins. Co. v. Dingley*, 40 C. C. A. 459, 100 Fed. 408, 49 L. R. A. 133; *Mutual Life Ins. Co. v. Hill*, 38 C. C. A. 159, 97 Fed. 263, 49 L. R. A. 127; *Seiders v. Merchants' Life Ass'n*, 93 Tex. 194, 54 S. W. 753; *Germania Life Ins. Co. v. Peetz* (Tex. Civ. App.), 47 S. W. 687.

⁴¹ *Larkin v. Glens Falls Ins. Co.*, 80 Minn. 527, 83 N. W. 410; *Hamburg-Bremen Fire Ins. Co. v. Garlington*, 66 Tex. 103; *Brady v. Northwestern Ins. Co.*, 11 Mich. 445; *Fire Association v. Rosenthal*, 108 Pa. St. 474; *Monteleone v. Royal Ins. Co.*, 47 La. Ann. 1563.

a policy against the contention of the insurer, create a doubt as to its interpretation of sufficient gravity to be resolved in favor of the insured, if the insurer continues to issue the same form of policy.⁴²

It is in accord with the weight of authority and with principle that where the parties to a contract live in different states, or if living in one state they make a contract to be performed in another, they may, acting in good faith, and without intent to evade the law, agree that the law of either state shall control in the interpretation and validity of the contract. A stipulation in an application that a policy issued thereon shall be construed by the law of the domicile of the insurer is valid and effectual;⁴³ and so if the stipulation is in the policy.⁴⁴ But such stipulations cannot overcome the effect of statutes in force at the place where the contract is actually made.⁴⁵

CUSTOM AND USAGE.

§ 69. The parties to a contract of insurance will be presumed to have contracted with reference to known usages and customs which enter into and govern the business or subject matter to which it relates.⁴⁶

⁴² *Fidelity & Casualty Co. v. Lowenstein* (C. C. A.), 97 Fed. 17, 46 L. R. A. 450.

⁴³ *Johnson v. New York Life Ins. Co.*, 109 Iowa, 708, 78 N. W. 905; *Mutual Life Ins. Co. v. Dingley* (C. C. A.), 100 Fed. 408, 49 L. R. A. 133.

⁴⁴ *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 146, 36 L. R. A. 271; *Wayman v. Douthard*, 10 Wheat. (U. S.) 1; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397; *Voorheis v. People's Mut. Ben. Soc.*, 91 Mich. 469, 51 N. W. 1109.

⁴⁵ *New York Life Ins. Co. v. Russell* (C. C. A.), 77 Fed. 95.

⁴⁶ *McGregor v. Insurance Co. of Pennsylvania*, 1 Wash. C. C. 39, Fed. Cas. No. 8,811; *Arnould, Ins.* 65; *Hicks v. British America Assur. Co.*, 162 N. Y. 284, 48 L. R. A. 424; *Home Ins. Co. v. Adler*, 71 Ala. 516, 77 Ala. 242; *Boright v. Springfield F. & M. Ins. Co.*, 34 Minn. 353; *Holbrook v. St. Paul F. & M. Ins. Co.*, 25 Minn. 229; *Hey*

A custom or usage, to be valid and binding, must be general, well established, reasonable, and not subversive of general principles of law.⁴⁷

Usage and custom are admissible to explain what is doubtful, but never to contradict what is plain.⁴⁸

STANDARD POLICIES.

§ 70. A standard policy, whose form is prescribed by the legislature of a state, and whose use by insurance companies doing business within that state is made compulsory, should, so far as concerns the interpretation of the body of the policy whose wording follows the statute, be construed as a statutory enactment, and not as a contract prepared by the insurer.

We have already seen that ambiguous words or phrases found in ordinary insurance policies, which are the voluntary contracts of the insured and insurer, are construed most strongly against the latter in accordance with the rule "*verba fortius accipiuntur contra proferentem.*" This ancient rule is based upon reason and was framed for the purposes of justice, and should not be asserted or construed so as to defeat the very ends it was intended to accomplish. Reason is the

v. Guarantors' Liability Ind. Co., 181 Pa. St. 220; Jones v. German Ins. Co., 110 Iowa, 75, 81 N. W. 188, 46 L. R. A. 860; Home Ins. Co. v. Favorite, 46 Ill. 263; Mason v. Franklin Fire Ins. Co., 12 Gill (Md.), 468; Edie v. East India Co., 2 Burrows, 1226; Hazard's Adm'r v. The New England Marine Ins. Co., 8 Pet. (U. S.) 582; Rogers v. Mechanics' Ins. Co., 1 Story, 607, Fed. Cas. No. 12,016; Union Cent. Life Ins. Co. v. Pottker, 33 Ohio St. 459; Helme v. Philadelphia Life Ins. Co., 61 Pa. St. 107; Baxter v. Massasoit Ins. Co., 13 Allen (Mass.), 320.

⁴⁷ Merchants' Ins. Co. v. Prince, 50 Minn. 53; Bryant v. Commonwealth Ins. Co., 6 Pick. (Mass.) 131; Macy v. Whaling Ins. Co., 9 Metc. (Mass.) 363; Cobb v. New England Mut. Marine Ins. Co., 6 Gray (Mass.), 192; Livingston v. Maryland Ins. Co., 7 Cranch (U. S.), 506.

⁴⁸ Grace v. American Cent. Ins. Co., 109 U. S. 278; Hone v. Mutual Safety Ins. Co., 1 Sandf. (N. Y.) 149; Manson v. Grand Lodge, A. O. U. W., 30 Minn. 509.

soul of the rule, and when the reason of any particular rule ceases, so does the rule itself. "*Cessante ratione legis cessat ipsa lex.*" So when the law of the place where the contract is made prohibits the parties to an insurance policy from agreeing upon their own terms, and prohibits the insurer from preparing its own policy, and prescribes the very words and form of the only policy which can be legally executed, a policy which is issued in conformity to the law is, in so far as it follows the prescribed form, prepared not by the insurer, but by the legislature, which alone is responsible for uncertainties and ambiguities of the language in which it has expressed itself; and the reason for the rule "*contra proferentem*" does not exist, and the act of the legislature should be interpreted and construed as any other statute in derogation of common right and not as a contract prepared by the insurer.^{48a} There is no more justice, nor logic, nor reason in favor of a contrary doctrine than there would be in an assertion that a penal statute ought to be construed most strongly against a criminal and in favor of the prosecution, because such statute was enacted to protect the public and to suppress and punish crime. In a New York case ⁴⁹ it was said that a standard policy should be construed most favorably to the insured, but the question under consideration was the effect to be given to the words "the insured," and it is doubtful if it was intended to hold more than was decisive of the case, viz.: that the language was intended to have a reasonable and not unreasonable meaning. In a later case the same court construes the act providing for a standard form of policy as itself making the contract of insurance, saying, "upon the passage of this im-

^{48a} *Rottier v. German Ins. Co.*, 86 N. W. 889 (Minn.).

⁴⁹ *Matthews v. American Cent. Ins. Co.*, 154 N. Y. 449, 39 L. R. A. 433.

portant legislation the policy of insurance was no longer of special moment, except as evidence that a contract to insure had been made; for it was no longer competent for the parties to incorporate into the policy any provision whatever, outside of those embraced within the terms of the standard policy."⁵⁰

A policy issued under and in conformity to an unconstitutional statute prescribing a compulsory form of policy, will be construed as a voluntary contract. Its provisions are subject to the ordinary rules of waiver, while the provisions of a valid standard policy can only be waived in the manner provided therein.⁵¹

POLICIES OF MUTUAL ORGANIZATIONS.

§ 71. The contract between a mutual aid or benefit insurance company and one of its members is, in legal contemplation, a policy of insurance, and to be construed as such.

The relation between a mutual insurance or benevolent organization and a member to whom a certificate or policy has been issued is contractual, and the contract will be construed under the rules of construction applicable to other insurance contracts. Whatever be the terms of payment of premium or dues by the member, or the mode of securing payment of the fund or benefit, it is still a contract of insurance.⁵² Of two reasonable constructions, that one will be

⁵⁰ Hicks v. British America Assur. Co., 162 N. Y. 284, 48 L. R. A. 424; Hamilton v. Royal Ins. Co., 156 N. Y. 327, 50 N. E. 863.

⁵¹ Anderson v. Manchester Fire Assur. Co., 59 Minn. 182, 28 L. R. A. 609; Straker v. Phenix Ins. Co., 101 Wis. 413, 77 N. W. 753; Dowling v. Lancashire Ins. Co., 92 Wis. 63, 31 L. R. A. 112; O'Neil v. American Fire Ins. Co., 166 Pa. St. 72, 26 L. R. A. 715; Hicks v. British America Assur. Co., 162 N. Y. 284, 48 L. R. A. 424. See, also, Union Cent. Life Ins. Co. v. Pollard, 94 Va. 146, 36 L. R. A. 271; Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 9 L. R. A. 45.

⁵² Cluff v. Mutual Ben. Life Ins. Co., 99 Mass. 317; Elkhart Mut. Aid B. & R. Ass'n v. Houghton, 103 Ind. 286; State v. Bankers' &

adopted which will best effectuate the objects of the association and sustain the claims of the members.⁵³ Certificates are sometimes construed as if a will or testament. Vested, rather than contingent rights are favored; the first, rather than the second taker.⁵⁴ Where the certificate of membership of a mutual benefit society is authorized by its charter, but is inconsistent with the by-laws, the former controls;⁵⁵ but neither the customs, nor opinion of the officers as to the meaning of express words in the contract, can affect the rights of a member.⁵⁶

Merchants' Mut. Ben. Ass'n, 23 Kan. 499; Folmer's Appeal, 87 Pa. St. 133; Illinois Masons' Benev. Soc. v. Baldwin, 86 Ill. 479; Com. v. Wetherbee, 105 Mass. 149; Holland v. Supreme Council, O. C. F., 54 N. J. Law, 490; Goodman v. Jedidjah Lodge No. 7, 67 Md. 117.

⁵³ Maynard v. Locomotive Engineers' Mut. L. & A. Ins. Ass'n, 16 Utah, 145; Ballou v. Gile, 50 Wis. 614; Elsey v. Odd Fellows' Mut. Relief Ass'n, 142 Mass. 224.

⁵⁴ Chartrand v. Brace, 16 Colo. 19, 12 L. R. A. 213; Bolton v. Bolton, 73 Me. 299; Union Mut. Ass'n v. Montgomery, 70 Mich. 587.

⁵⁵ McCoy v. Northwestern Mut. Relief Ass'n, 92 Wis. 577, 66 N. W. 697; Davidson v. Old People's Mut. Ben. Soc., 39 Minn. 303; Union Mut. Fire Ins. Co. v. Keyser, 32 N. H. 313; Failey v. Fee, 83 Md. 83, 32 L. R. A. 311.

⁵⁶ Manson v. Grand Lodge, A. O. U. W., 30 Minn. 509; Wiggins v. Knights of Pythias, 31 Fed. 122; District Grand Lodge No. 4 v. Cohn, 20 Ill. App. 335; Davidson v. Supreme Lodge, K. of P., 22 Mo. App. 263.

CHAPTER VII.

THE CONTRACT (*Continued*)—REFORMATION, MODIFICATION, AND RESCISSION.

§ 72. Reformation of Policy.

73. Modification of Contract.

74. Disaffirmance or Rescission.

REFORMATION OF POLICY.

§ 72. Where, through the mutual mistake of the parties, or the mistake of one party and the intentional fraud of the other, a contract of insurance has been made which does not express the real intention and agreement of the parties thereto, a court of equity will, upon a proper showing, reform the contract so as to make it express that intention and agreement.

In such matters the courts act with great caution, and will grant a prayer for reformation only upon clear and convincing proof that the contract ought to be reformed.

It sometimes happens that through the mutual mistake of the insurer and the insured, a policy of insurance secures to the insured benefits, protection, or indemnity, which the insurer did not intend to furnish and which the insured did not intend to obtain. That a court of equity has power to correct this mutual mistake, make the instrument given in execution and fulfillment of the preliminary negotiations conform to the real intention of the parties as established by clear and convincing proof, and hold the parties to their actual agreement, cannot be doubted. And this power is not strictly limited to cases of mistake of fact, but extends also to mistakes of law. While, if nothing more than the bare mistake be shown as a reason for relief, it will rarely, if ever, be granted, yet equity will interfere where it further appears

that the one party, availing himself of the opportunities afforded by the mistake, will enforce an unconscionable advantage without consideration, he being in no position entitling him to equitable protection, and the other party not being blamable. But this jurisdiction will be exercised with caution, and only very clear and convincing proofs will be sufficient to overcome the presumption that the written instrument which the parties have executed for the purpose of evidencing and carrying into effect their agreement is in legal effect or in terms contrary to their intention. A suit to obtain such relief may be maintained either before or after a loss. Oral evidence is admissible to show the true agreement.¹

If reformation be sought solely upon the ground of mistake of fact, it must appear that the mistake was mutual and common to both parties. A court cannot create for the parties a contract which they did not both intend to make. A mistake on one side may be ground for rescinding, but not for reforming, a contract.² But evidence that a written agreement was made through the honest mistake of one party and

¹ *Snell v. Atlantic F. & M. Ins. Co.*, 98 U. S. 85; *Hearne v. New England Mut. Marine Ins. Co.*, 20 Wall. (U. S.) 488; *Coles v. Bowne*, 10 Paige (N. Y.), 526; *Palmer v. Hartford Fire Ins. Co.*, 54 Conn. 488; *Henderson v. Travelers' Ins. Co.*, 65 Fed. 438; *German Fire Ins. Co. v. Gueck*, 130 Ill. 345, 6 L. R. A. 835; *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119; *Mead v. Westchester Fire Ins. Co.*, 64 N. Y. 453; *Kleis v. Niagara Fire Ins. Co.*, 117 Mich. 469, 76 N. W. 155; *Bryce v. Lorillard Fire Ins. Co.*, 55 N. Y. 240; *Slobodisky v. Phenix Ins. Co.*, 52 Neb. 395, 72 N. W. 483; *Spurr v. Home Ins. Co.*, 40 Minn. 424; *Fitchner v. Fidelity Mut. Fire Ass'n*, 68 N. W. 710; *Id.*, 103 Iowa, 276, 72 N. W. 530; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Bailey v. American Cent. Ins. Co.*, 4 McCrary, 221, 13 Fed. 250.

² *Moeller v. America Fire Ins. Co.*, 52 Minn. 337; *Hearne v. New England Mut. Marine Ins. Co.*, 20 Wall. (U. S.) 488; *Baldwin v. State Ins. Co.*, 60 Iowa, 497; *McCormick v. Orient Ins. Co.*, 86 Cal. 260; *Durham v. Fire & Marine Ins. Co.*, 22 Fed. 468, 10 Sawy. 526.

fraud or concealment of the other, is sufficient to entitle the former to a reformation.³ Upon the principle that he who seeks equitable relief must come into court with clean hands, a suitor cannot have a policy reformed so as to relieve him from the consequences of his own fraudulent or dishonest act. An insurance company can, with the consent of the insured, after the happening of the contingency insured against, substitute a new policy in the place of, and for the purpose of correcting, one previously issued, thus making itself liable under the last instead of the first policy.⁴ These rules apply also to renewals.⁵ A misdescription of the subject matter,⁶ or the insured,⁷ may be corrected. The failure of an insured to read his policy when it was delivered to him is not such negligence as defeats his right to a reformation.⁸ An insured cannot ignore his policy which does not correctly embody the agreement and sue upon the oral contract; he must seek his remedy by an equitable action to rescind or

³ *Palmer v. Hartford Fire Ins. Co.*, 54 Conn. 488; *Fitchner v. Fidelity Mut. Fire Ass'n*, 103 Iowa, 276, 72 N. W. 530; *Devereaux v. Sun Fire Office of London*, 51 Hun (N. Y.), 147; *Cushman v. New England Fire Ins. Co.*, 65 Vt. 569; *Doniol v. Commercial Fire Ins. Co.*, 34 N. J. Eq. 30.

⁴ *Ford v. United States Mut. Acc. Relief Co.*, 148 Mass. 153, 1 L. R. A. 700; post, note 21.

⁵ *Palmer v. Hartford Fire Ins. Co.*, 54 Conn. 488; *Phœnix Fire Ins. Co. v. Hoffheimer*, 46 Miss. 645; *Van Tuyl v. Westchester Fire Ins. Co.*, 55 N. Y. 657.

⁶ *German Fire Ins. Co. v. Gueck*, 130 Ill. 345; *Bryce v. Lorillard Fire Ins. Co.*, 55 N. Y. 240.

⁷ *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119; *Keith v. Globe Ins. Co.*, 52 Ill. 518.

⁸ *Fitchner v. Fidelity Mut. Fire Ass'n*, 103 Iowa, 276, 72 N. W. 530; *La Marche v. New York Life Ins. Co.*, 126 Cal. 498, 58 Pac. 1053; ante, note 5. Compare *Reynolds v. Atlas Acc. Ins. Co.*, 63 Minn. 93.

reform the policy upon the ground of fraud or mistake.⁹ But where a policy is issued under circumstances which constitute a waiver of its conditions, recovery may be had without having the policy reformed so as to express the consent of the insurer to the violations of its terms;¹⁰ and so frequently the doctrine of waiver and estoppel is invoked, and proof of mistake is permitted and a suitor allowed to recover directly in an action at law.¹¹ But proof of mistake or misdescription should be received with great caution in actions at law, and only when the variance is immaterial or where the real contract of the parties is apparent. Then parol evidence is sometimes admissible, not to vary the written contract, but simply to identify its subject matter, or the parties, or some person or thing described or referred to.¹²

A court of equity may in a single action, upon proper proof, reform a policy and enforce it as reformed.¹³ A party may not have a policy reformed after he has sued upon it and failed to recover,¹⁴ but the mere commencement of a suit which is dismissed without a determination upon the merits

⁹ *Kleis v. Niagara Fire Ins. Co.*, 117 Mich. 469, 76 N. W. 155.

¹⁰ *Hobkirk v. Phoenix Ins. Co.*, 102 Wis. 113, 78 N. W. 160.

¹¹ *Omaha Fire Ins. Co. v. Dufek*, 44 Neb. 241, 62 N. W. 465; *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533; *Amazon Ins. Co. v. Wall*, 31 Ohio St. 628; *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227; *Germania Life Ins. Co. v. Lunkenheimer*, 127 Ind. 536; *Lumbermen's Mut. Ins. Co. v. Bell*, 166 Ill. 400, 45 N. E. 130; *Wilson v. Conway Fire Ins. Co.*, 4 R. I. 141; *Gerrish v. German Ins. Co.*, 55 N. H. 355; *Kansas Farmers' Fire Ins. Co. v. Saindon*, 52 Kan. 486, 53 Kan. 623.

¹² *Greenleaf, Evidence*, § 300 et seq.; *Phoenix Ins. Co. v. Gebhart*, 32 Neb. 144. Compare *Kleis v. Niagara Fire Ins. Co.*, 117 Mich. 469, 76 N. W. 155.

¹³ *Spurr v. Home Ins. Co.*, 40 Minn. 424, §§ 32, 33.

¹⁴ *Washburn v. Great Western Ins. Co.*, 114 Mass. 175; *Steinbach v. Relief Fire Ins. Co.*, 77 N. Y. 498.

is no bar to a subsequent action for reformation.¹⁵ A suit for reformation can only be maintained by the real party in interest and the plaintiff must be a party or privy to the contract.¹⁶

Courts will enforce the contracts of parties, but cannot make contracts for them. A policy will only be reformed upon clear and convincing evidence that the insurer agreed to insure the insured in respect to some particular subject matter upon terms mutually understood, and that the policy does not contain the agreement made by the parties. There must be proof of mutual agreement on the terms of the contract, and proof of mutual mistake, or mistake on the part of one and fraud, misrepresentation, or concealment on the part of the other party to the contract in order that a decree reforming it may be granted.¹⁷ Reformation will not be granted at the instance of one who is guilty of laches,¹⁸ or fraud in pro-

¹⁵ *Spurr v. Home Ins. Co.*, 40 Minn. 424.

¹⁶ *Newman v. Home Ins. Co.*, 20 Minn. 422 (Gil. 378); *Baldwin v. State Ins. Co.*, 60 Iowa, 497; *Moeller v. American Fire Ins. Co.*, 52 Minn. 337, 54 N. W. 189; *Dean v. Equitable Fire Ins. Co.*, 4 Cliff. 575, Fed. Cas. No. 3,705.

¹⁷ *Travelers' Ins. Co. v. Henderson*, 69 Fed. 762, 16 C. C. A. 390; *St. Clara Female Academy v. Delaware Ins. Co.*, 93 Wis. 57, 66 N. W. 1140; *Dougherty v. Greenwich Ins. Co.* (N. J.), 33 Atl. 295; *Schmid v. Virginia F. & M. Ins. Co.* (Tenn.), 37 S. W. 1013; *New York Life Ins. Co. v. McMaster's Adm'r*, 57 U. S. App. 638, 87 Fed. 63; *Westchester Fire Ins. Co. v. Wagner* (Tex.), 38 S. W. 214; *Hartford Ins. Co. v. Haas*, 87 Ky. 531; *Doniol v. Commercial Fire Ins. Co.*, 34 N. J. Eq. 30; *Mead v. Westchester Fire Ins. Co.*, 64 N. Y. 453; *Aetna Life Ins. Co. v. Mason*, 14 R. I. 583; *German American Ins. Co. v. Davis*, 131 Mass. 316; *Insurance & Banking Co. v. Butler*, 55 Md. 233; *Hughes v. Mercantile Mut. Ins. Co.*, 55 N. Y. 265; *Travis v. Peabody Ins. Co.*, 28 W. Va. 583.

¹⁸ *St. Paul F. & M. Ins. Co. v. Shaver*, 76 Iowa, 282, 41 N. W. 19; *Bishop v. Clay F. & M. Ins. Co.*, 49 Conn. 167; *Susquehanna Mut. Fire Ins. Co. v. Swank*, 102 Pa. St. 17; *Reynolds v. Atlas Acc. Ins. Co.*, 69 Minn. 93.

curing the policy,¹⁹ or when no action is maintainable on the policy because of lapse of time.²⁰

MODIFICATION OF CONTRACT.

§ 73. In the absence of statutory provisions to the contrary, a policy may be modified or varied by a subsequent verbal agreement of the parties. Stipulations in a contract requiring changes or waiver to be in writing are not binding.²¹

DISAFFIRMANCE OR RESCISSION.

§ 74. A policy or renewal procured or issued through fraud, deceit, concealment or misrepresentation of either party may be disaffirmed by the party not at fault;²² and a policy which does not express an agreement of the parties because their minds did not meet upon an essential, as, for instance, upon

¹⁹ *Spare v. Home Mut. Ins. Co.*, 19 Fed. 14; ante, notes 3, 4; *Cushman v. New England Fire Ins. Co.*, 65 Vt. 569.

²⁰ *Thompson v. Phoenix Ins. Co.*, 25 Fed. 296.

²¹ *Mobile Life Ins. Co. v. Pruett*, 74 Ala. 487; *Harris v. Phoenix Ins. Co.*, 85 Iowa, 238, 52 N. W. 128; *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 153; *Fireman's Fund Ins. Co. v. Norwood*, 69 Fed. 71, 16 C. C. A. 136; *London & L. Fire Ins. Co. v. Storrs*, 71 Fed. 120, 17 C. C. A. 645; *Lamberton v. Connecticut Fire Ins. Co.*, 39 Minn. 129. For substitution of policy, see *Ford v. United States Mut. Acc. Relief Co.*, 148 Mass. 153, 1 L. R. A. 700; *Cheever v. Union Cent. Life Ins. Co.*, 5 Bigelow, *Life & Acc. Rep.* 458. Standard policies may and often do require waiver or modification to be done in a particular manner. The method thus prescribed is exclusive. *Hicks v. British America Assur. Co.*, 162 N. Y. 284, 48 L. R. A. 424. See, also, cases in note 51, c. 6, ante; *Quinlan v. Providence Wash. Ins. Co.*, 133 N. Y. 365; *Mutual Life Ins. Co. v. Dingley*, 100 Fed. 408, 49 L. R. A. 132.

²² *Harris v. Equitable Life Assur. Soc.*, 64 N. Y. 196; *Godfrey v. New York Life Ins. Co.*, 70 Minn. 224; *Michigan Mut. Life Ins. Co. v. Reed*, 84 Mich. 524; *Trabandt v. Connecticut Mut. Life Ins. Co.*, 131 Mass. 167; *Globe Mut. Life Ins. Co. v. Reals*, 50 How. Pr. (N. Y.) 237. As to rescission for breach of contract, see *American Union Life Ins. Co. v. Wood (Tex.)*, 57 S. W. 685.

the subject matter, may be canceled or rescinded.²³ In this connection, the ordinary rules of ratification, waiver and estoppel apply.

²³ *Hearne v. New England Mut. Marine Ins. Co.*, 20 Wall. (U. S.) 488; *Benson v. Markoe*, 37 Minn. 37; *Wheeler v. Odd Fellows' Mut. Aid & Acc. Ass'n*, 44 Minn. 513; *McKinnon v. Vollmar*, 75 Wis. 82. The contract may be abandoned or rescinded by mutual consent of the parties, *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 20 Sup. Ct. 906; or by the election of the insured to have it terminated when this election is accepted by the insurer, *Mutual Life Ins. Co. v. Sears*, 178 U. S. 345; *Mutual Life Ins. Co. v. Hill*, 178 U. S. 347. See, also, *Hamm Realty Co. v. New Hampshire Fire Ins. Co.*, 80 Minn. 139, 83 N. W. 41. See, also, *Cable v. United States Life Ins. Co.*, 111 Fed. 19.

CHAPTER VIII.

AGENTS.

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IN GENERAL.

§ 75. Insurance companies, like other corporations, must transact their business through agents.

Insurance agents in all their dealings and relations are governed by the general rules of the law of agency; e. g.,

- (a) They bind their principal by all acts performed within the scope of their real or apparent authority.
- (b) The principal is not bound by the acts of the agent in excess of his actual authority, except in cases where the doctrine of estoppel can be invoked.
- (c) The public is not affected by secret limitations upon the apparent authority of an agent.
- (d) The one asserting agency must prove its existence and extent.

The powers of agents are liberally construed in favor of the insured.

An agent cannot act for both insurer and insured in the same transaction without the consent of both.

An agent has no power to insure property after it has been destroyed.

The Powers of the Agent.

The powers possessed by the agents of insurance companies, like those of agents of any other corporation, are to be interpreted in accordance with the legal principles which govern the general law of agency. Agents possess only such powers as have been conferred upon them verbally, or by an instrument of authorization, or such as third persons have a right

to presume they possess. Where the act or representation of the agent of an insurance company is alleged as the act of the principal—and therefore binding upon the latter—the test of the liability is the same as in other cases of agency. If a person knows that an agent is acting under circumscribed or limited authority, and that his acts are outside of and transcend the authority conferred, the principal is not bound; and it is immaterial whether the agent be a general or a special one, because the principal may limit the power of one as well as the other. But the principal is always bound by the acts of his agent within the real or apparent scope of his authority. The existence and extent of an agent's power or authority to act on behalf of or to bind his principal in a particular manner or at all must be determined as questions of fact. The legal effect thereof when thus ascertained becomes a question of law.

The powers of an agent may be express, i. e. directly given him by his principal, orally, or in writing; or implied, i. e. necessary and convenient for the execution of his express authority; or apparent, i. e. such as he assumes to have and which he exercises with the knowledge of and approbation of his principal. The actual powers of an agent consist in the sum total of these three, or so many of them as exist in a given case.

A power specifically granted, carries with it by implication such other and incidental powers as are directly and immediately appropriate to the execution of the specific power granted—such as are suitable and proper to that end. Hence the implied powers of the agent. The rule as to apparent authority rests essentially on the doctrine of estoppel. The rule is that where one has reasonably and in good faith been led to believe from the appearance of authority which another permits his agent to have, that the agent was possessed of

certain powers, and because of such belief has in good faith dealt with such agent exercising those powers, the principal will not be allowed to deny the agency to the prejudice of one so dealing. To bind a principal for an unauthorized act of his agent, on the ground that a long course of dealing and conduct on the part of the agent created or established apparent authority in the agent to do the act sought to be enforced, it must be shown that the principal had notice of such conduct and course of dealing, and permitted or acquiesced therein, or that the course of dealing was of such a nature and character as to make it the duty of the principal, as a matter of law, to know of it. If the nature of the business or dealings of the agent be of this latter character, and the principal by his culpable negligence permits it to continue, he is estopped to deny the authority of the agent. But if it be not of such character, then, to bind the principal on the theory of apparent authority, it must be shown that he knowingly permitted or sanctioned the conduct and course of dealing. And on the question of the authority of an agent the party dealing with him may prove the course and manner of dealing between the principal and agent from which actual authority may be implied, though the party did not know of such course and manner of business at the time he dealt with the agent.¹

¹ *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234; *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Greenleaf v. Moody*, 95 Mass. 363; *Weidert v. State Ins. Co.*, 19 Or. 261, 20 Am. St. Rep. 809, 1 Am. & Eng. Enc. Law, 965, 989, 999; *Jackson v. Mutual Ben. Life Ins. Co.*, 79 Minn. 44, 82 N. W. 366; *Columbia Mill Co. v. National Bank of Commerce*, 52 Minn. 225; *Quinlan v. Providence Wash. Ins. Co.*, 133 N. Y. 365; *Markey v. Mutual Ben. Life Ins. Co.*, 103 Mass. 78; *Keith v. Globe Ins. Co.*, 52 Ill. 518; *Farmers' Mut. Ins. Co. v. Taylor*, 73 Pa. St. 343; *Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 415; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; *Dwelling House Ins. Co. v. Dowdall*, 159 Ill. 179.

The tendency of courts is toward the liberal construction of an agent's powers.²

ACTUAL AUTHORITY.

§ 76. The actual authority conferred upon an agent is primarily the limit of his powers.

Unless the act of an agent which is in excess or abuse of his actual authority has induced a third person, who believed, and had a right to believe, that the act was within the authority of the agent and exercised in a proper way, to act or refrain from acting in reliance thereon, and who would be injured if the act was not considered that of the principal, the latter would not be bound.³ A request by an insurance company of a given person that he shall collect a balance due from a former agent, or to make up his account from his books, or mail a canceled policy, does not give him apparent authority to issue policies for the company.⁴ An agent who insures the hull of a boat under a short certificate, subject to the conditions of an open policy, which is referred to, such policy being without a clause which could cover such hull, being a cargo policy, does not bind his principal, because there is no real or apparent authority manifest.⁵ Where an insurance company gave its agent a power of attorney constituting him its true

² Union Mut. Ins. Co. v. Wilkinson, 13 Wall. (U. S.) 222; Aetna Ins. Co. v. Maguire, 51 Ill. 342; Merchants' Ins. Co. v. New Mexico Lumber Co., 10 Colo. App. 223, 51 Pac. 174; Winne v. Niagara Fire Ins. Co., 91 N. Y. 185; St. Paul F. & M. Ins. Co. v. Parsons, 47 Minn. 352; Union Mut. Life Ins. Co. v. Masten, 3 Fed. 881; Haughton v. Ewbank, 4 Camp. 88; Grady v. American Ins. Co., 60 Mo. 116.

³ Walsh v. Hartford Fire Ins. Co., 73 N. Y. 5; Reynolds v. Continental Ins. Co., 26 Mich. 131; Sun Fire Office v. Wich, 6 Colo. App. 103, 39 Pac. 587; Dryer v. Security Fire Ins. Co., 94 Iowa, 471, 62 N. W. 798; German Ins. Co. v. Davis, 40 Neb. 700, 59 N. W. 698.

⁴ Rahr v. Manchester Fire Assur. Co., 93 Wis. 355, 67 N. W. 725.

⁵ Barry v. Boston Marine Ins. Co., 62 Mich. 424, 29 N. W. 31.

and lawful attorney to act as its agent and receiver, and effect insurance, and exercise other powers necessary to the ordinary working of an insurance company, and such agent made deposits with a banker, bought exchange, etc., the account being kept in the name of the company, and in the course of these transactions the agent became indebted to plaintiff, it was held that the transactions were outside the usual business of the company and it was not liable.⁶ In a federal case defendant insured the interest of a half owner of a vessel, which became stranded during a voyage; insured requested insurer to render her assistance and a wrecking master was sent with instructions to render necessary assistance. Insured abandoned his interest, and the wrecking master with the aid of the master and the crew, and without other authority from the insurer, after removing the vessel to a harbor, attempted to navigate her to her home port, during which attempt she was lost. Held, that the insurer was not liable to the owner of the uninsured interest for the loss, and is not, as to him, chargeable with negligence.⁷ An agent who is only authorized to solicit and take applications for insurance, receive the premiums, and deliver the policies which have been signed by the proper officers, has no authority, either expressed or implied, to make a binding contract of insurance,⁸ or to waive a breach of the stipulation in the policy that subsequent additional insurance shall not be effected on the property without the consent of the underwriter.⁹ And an oral permission by an agent that premises may remain vacant is not binding on the insurer, nor of any benefit to the

⁶ McDonald v. Royal Ins. Co., 3 Russ. & G. (Nova Scotia) 428.

⁷ Kirby v. Thames & Mersey Ins. Co., 27 Fed. 221.

⁸ Morse v. St. Paul F. & M. Ins. Co., 21 Minn. 497.

⁹ Alabama State Mut. Assur. Co. v. Long Clothing & S. Co. (Ala.), 26 So. 655.

insured, where he had express notice that the company had refused to have such a provision written in the policy.¹⁰ Nor can an agent waive a provision of the policy that "no insurance would be binding until actual payment of the premium" where the policy states that none of its terms can be waived by anyone except the secretary of the company.¹¹ An agent with power to issue policies, may bind his principal by an oral contract to insure;¹² and by putting construction upon doubtful language in the policy;¹³ and by the renewal of ex-

¹⁰ *Sutherland v. Eureka F. & M. Ins. Co.*, 110 Mich. 668, 68 N. W. 985.

¹¹ *Wilkins v. State Ins. Co.*, 43 Minn. 177; post, note 259.

¹² *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 54 N. E. 883; *Stelick v. Milwaukee Mechanics' Ins. Co.*, 87 Wis. 322, 58 N. W. 379; *Ganser v. Fireman's Fund Ins. Co.*, 38 Minn. 74; *Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 415; *Mathers v. Union Mut. Acc. Ass'n*, 78 Wis. 588, 47 N. W. 1130; post, notes 208, 209, 253-255. But see *More v. New York Bowery Fire Ins. Co.*, 130 N. Y. 537.

¹³ *Hotchkiss v. Phoenix Ins. Co.*, 76 Wis. 269; *Standard Life & Acc. Ins. Co. v. Fraser (C. C. A.)*, 76 Fed. 705; *Campbell v. International Life Assur. Soc.*, 4 Bosw. (N. Y.) 298; *Phoenix Ins. Co. v. Warttenberg (C. C. A.)*, 79 Fed. 245, 26 Ins. Law J. 552; *Mathers v. Union Mut. Acc. Ass'n*, 78 Wis. 588, 47 N. W. 1130; *Michigan Shingle Co. v. State Inv. & Ins. Co.*, 94 Mich. 389, 53 N. W. 945; *Michigan Shingle Co. v. Pennsylvania Fire Ins. Co.*, 98 Mich. 609, 57 N. W. 802; *Graybill v. Penn. Township Mut. Fire Ins. Ass'n*, 170 Pa. St. 75, 50 Am. St. Rep. 747; *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 315; *Dryer v. Security Fire Ins. Co.*, 94 Iowa, 471, 62 N. W. 798; *Winchell v. Iowa State Ins. Co.*, 103 Iowa, 189, 72 N. W. 503; *Kroeger v. Pitcairn*, 101 Pa. St. 311. And the representation of an agent that under a certain clause in the policy the insured, by paying the annual premium, would have a period of thirteen months during which the policy could not be forfeited, puts a construction on the policy which binds the company. *McMaster v. New York Life Ins. Co.*, 78 Fed. 33. Otherwise if the application make the solicitor the agent of the insured. *Hubbard v. Mutual Reserve Fund Life Ass'n*, 80 Fed. 681; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519.

Where the agent of an insurer writes in the application that the applicant had no other insurance, although the applicant told him

isting insurance;¹⁴ and by an unexecuted oral agreement to renew;¹⁵ and by any act, agreement, representation or waiver within the ordinary scope and limit of his business which is not known by the assured to be outside the authority granted to the agent.¹⁶

The oral fraudulent representations of the insurer's agent, as to the terms of the policy to be issued, bind the insurer and constitute ground for rescission, although the policy provides that no statements, promises, or information made or given by the person soliciting or taking the application for a policy shall bind the company or affect its right, unless reduced to writing and presented in the application to the officers of the company at the home office.¹⁷ An insurance company is liable to third persons in a civil action for the frauds, deceits, concealments, misrepresentations and omissions of duty of a general agent in the course of his employ-

that he had certificates of membership in co-operative companies, which the agent said were not considered insurance by him, the company is bound by the agent's interpretation, and is estopped from asserting to the contrary. *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304, 33 L. Ed. 341; post, note 341. The agent cannot bind his principal by his expression of an opinion as to the law of the contract. *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327-343; *Chamberlain v. Prudential Ins. Co.* (Wis.), 85 N. W. 128.

¹⁴ *Carroll v. Charter Oak Ins. Co.*, 40 Barb. (N. Y.) 292; *Baubie v. Aetna Ins. Co.*, 2 Dill. 156, Fed. Cas. No. 1,111.

¹⁵ *McCabe v. Aetna Ins. Co.* (N. D.), 81 N. W. 426. Compare *Johnson v. Connecticut Fire Ins. Co.*, 84 Ky. 470; *O'Reilly v. Corporation of London Assur.*, 101 N. Y. 575; *Dinning v. Phoenix Ins. Co.*, 68 Ill. 414; *Croghan v. New York Underwriters' Agency*, 53 Ga. 109; *Taylor v. Phenix Ins. Co.*, 47 Wis. 365, 2 N. W. 559; *Kruger v. Western F. & M. Ins. Co.*, 72 Cal. 91; *New York Cent. Ins. Co. v. Watson*, 23 Mich. 486.

¹⁶ *Milwaukee Mechanics' Ins. Co. v. Brown* (Kan.), 44 Pac. 35; *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Continental Ins. Co. v. Kasey*, 25 Grat. (Va.) 268.

¹⁷ *McCarty v. New York Life Ins. Co.*, 74 Minn. 530, 77 N. W. 426.

ment when the acts committed are apparently within the general scope of his authority although not so in fact, although his conduct was not authorized or justified by it;¹⁸ and is bound by the agreement of its agent to return a note given for the premium if the application is not accepted.¹⁹

When the instructions of the principal are equivocal and fairly susceptible of two different constructions, it is bound by the interpretation acted on by its agent.²⁰ The principal is bound by the contract of employment for the solicitation of risks made by its general agent, unless the person employed had notice of private restrictions upon the agent's authority.²¹ A demand upon an agent under the provisions of a contract is a demand upon his principal.²² An appointment to act as "agent or surveyor" must be taken in the general sense and as conferring all the powers which the company might give its representative. The term "surveyor" does not limit the word "agent." An agent so appointed may bind his principal by false representations which it was beyond the scope of his power to make.²³ It will be presumed that the agent of the insurer who issues a policy, has authority to consent to its assignment.²⁴

When the Principal is Not Bound — Illustrations.

The acts of an agent do not bind his principal, when assured is notified by the application and the policy that state-

¹⁸ *Atkins v. Equitable Life Assur. Soc.*, 132 Mass. 395; *New York Life Ins. Co. v. McGowan*, 18 Kan. 300.

¹⁹ *Mutual Life Ins. Co. v. Gorman* (Ky.), 40 S. W. 571.

²⁰ *Winne v. Niagara Fire Ins. Co.*, 91 N. Y. 185.

²¹ *Equitable Life Assur. Co. v. Brobst*, 18 Neb. 526, 26 N. W. 204. See post, "Sub-agents."

²² *Belt v. Brooklyn Life Ins. Co.*, 12 Mo. App. 100.

²³ *Lycoming Fire Ins. Co. v. Woodworth*, 83 Pa. St. 223; *Markey v. Mutual Ben. Life Ins. Co.*, 103 Mass. 78.

²⁴ *Breckinridge v. American Cent. Ins. Co.*, 87 Mo. 62.

ments will not be recognized by the company unless they are in writing, and that no stipulation or agreement should be in force unless it is in writing.²⁵ An agent cannot revive a canceled policy already rejected by his company unless he has authority covering the specific case.²⁶ An insurance company which repudiates an unauthorized compromise after a loss between its agent and the insured, whereby the payment of an additional premium by the latter was to be accepted by way of a waiver of a forfeiture under a clause respecting the condition of the property, is not bound to pay to the insured an amount equal to the additional premium paid by him to the agent, where it never received such premium from the agent or held him in any way bound for it.²⁷ One, who has knowledge that a soliciting agent has no authority to complete contracts, cannot claim the benefit of a contract against a principal as the result of negotiating with the agent.²⁸ If the blanks and forms furnished an agent disclose the limitations on his authority he cannot bind his principal by acts done in excess thereof in a transaction in which such blanks and forms are used.²⁹ It is not within the implied powers of an agent to agree to issue a life insurance policy to

²⁵ *Clevenger v. Mutual Life Ins. Co.*, 2 Dak. 114; *Hubbard v. Mutual Reserve Fund Life Ass'n*, 80 Fed. 681; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519; *Hill v. London Assur. Corp.*, 34 N. Y. St. Rep. 65, 12 N. Y. Supp. 86.

²⁶ *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502.

²⁷ *Merchants' Ins. Co. v. New Mexico Lumber Co.*, 10 Colo. App. 223, 26 Ins. Law J. 969, 51 Pac. 174.

²⁸ *Haskin v. Agricultural Fire Ins. Co.*, 78 Va. 700; *Dryer v. Security Fire Ins. Co.*, 94 Iowa, 471, 62 N. W. 798.

²⁹ *Lee v. Guardian Life Ins. Co.*, 2 Cent. Law J. 495; *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 5; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519; *Messelback v. Norman*, 122 N. Y. 578; *Clevenger v. Mutual Life Ins. Co.*, 2 Dak. 114; *Globe Mut. Life Ins. Co. v. Wolff*, 95 U. S. 329.

a physician with the agreement to take the payment of the premiums in professional services.³⁰

Secret Restrictions on the Power of an Agent.

Special instructions limiting the authority of an agent, whose powers would otherwise be co-extensive with the business intrusted to him, must be communicated to the party with whom he deals, or the principal will be bound to the same extent as though such special instructions were not given.³¹ It is well settled that the acts of an agent within the apparent scope of his authority, although in violation of undisclosed instructions, are binding on the principal unless there was something in the nature of the business or the facts of the case to indicate that the agent is acting under special instructions or limited powers, or unless the acts were done under such circumstances as to put the person dealing with the agent upon notice or inquiry as to his real authority.³² If an insurer expressly gives an agent powers outside of his written authority, or encourages him to exercise them for a long time and

³⁰ *Anchor Life Ins. Co. v. Pease*, 44 How. Pr. (N. Y.) 385. See, also, as to implied powers of agent, *Beebe v. Equitable Mut. L. & E. Ass'n*, 76 Iowa, 129, 40 N. W. 122; *Barber v. Connecticut Mut. Life Ins. Co.*, 15 Fed. 312; *Commercial Assur. Co. v. Rector*, 55 Ark. 630; *Getz v. Equitable Life Assur. Soc.*, 96 Iowa, 133, 64 N. W. 799; *Northern Assur. Co. v. Hamilton*, 50 Neb. 248, 69 N. W. 781; *Maryland Fire Ins. Co. v. Gusdorf*, 43 Md. 506; *Reynolds v. Continental Ins. Co.*, 36 Mich. 131; *Com. v. Mechanics' Mut. Fire Ins. Co.*, 120 Mass. 495; *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143; *Train v. Holland Purchase Ins. Co.*, 62 N. Y. 598; *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35; *United States Life Ins. Co. v. Advance Co.*, 80 Ill. 549; post, notes 259, 270-275.

³¹ *Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 421; *Southern Life Ins. Co. v. McCain*, 96 U. S. 84; *German Fire Ins. Co. v. Columbia Encaustic Tile Co.*, 15 Ind. App. 623, 43 N. E. 41; *Mohr & Mohr Distilling Co. v. Ohio Ins. Co.*, 13 Fed. 74.

³² *Harnden v. Milwaukee Mechanics' Ins. Co.*, 164 Mass. 382; *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222.

ratifies them so as to induce the public to rely on his enlarged agency, it cannot afterwards, without notice to those who knew of this course of dealing, fall back on his written authority to avoid acts done by their encouragement in the general scope of the business.³³

The fact that an insurance agent, having authority to issue policies, has received instructions not to insure a certain person, does not invalidate a contract by the agent to issue a policy to him when the latter had no knowledge of such instructions.³⁴ After the death of the insured, one who represents himself to be, and who was held out to the public as, a general agent, told the policy holder that he had no doubt the policy would be paid. Held, though between himself and the company he was by private arrangement without authority to adjust losses, that the evidence of what he said and did while acting in the capacity of general agent was admissible.³⁵

BURDEN OF PROOF OF AGENCY.

§ 77. The one asserting, must prove agency.

The burden is on the party asserting agency in a given person to prove the existence of the agency and the authority claimed for the agent. And the evidence produced for this purpose must go further than merely to be consistent with the

³³ *Farmers' Mut. Ins. Co. v. Taylor*, 73 Pa. St. 343.

³⁴ *Hicks v. British America Assur. Co.*, 13 App. Div. (N. Y.) 444, 43 N. Y. Supp. 623; *American Employers' Liability Ins. Co. v. Barr* (C. C. A.), 68 Fed. 873; *Hartford Fire Ins. Co. v. Farrish*, 73 Ill. 166; *Krumm v. Jefferson Fire Ins. Co.*, 40 Ohio St. 225. As to effect of custom giving notice of limitations of agent's powers, see 2 Duer, *Ins.* (Ed. 1846) p. 351; *Drake v. Marryat*, 1 Barn. & C. 473; *Armstrong v. State Ins. Co.* 61 Iowa, 212; *Winneshiek Ins. Co. v. Holzgrafe*, 53 Ill. 524.

³⁵ *Home Life Ins. Co. v. Pierce*, 75 Ill. 426. But see *American Life Ins. Co. v. Mahone*, 21 Wall. (U. S.) 152.

hypothesis that the agency existed with the power asserted. This rule has in some states been regulated by statute.³⁶ The law makes it obligatory upon the party dealing with an agent to ascertain the extent of his authority. If he fails to do so, it is at his own peril. One applying for insurance through a soliciting agent is bound to ascertain the scope of his authority, and is chargeable with knowledge of limitations of the agent's power; unless the principal has clothed the agent with apparent power to act in the premises.³⁷

PRESUMPTION OF FIDELITY.

§ 78. Agents are not presumed to disobey orders.

In the absence of clear, affirmative evidence to the contrary, the agent is not to be presumed to have disobeyed his instructions and violated his obligations to his principal.³⁸ And if an agent acting within the lines of his presumptive authority exceeds it, that is a matter within the exclusive knowledge of the insurer, who must prove it.³⁹

³⁶ *American Underwriters' Ass'n v. George*, 97 Pa. St. 238; *Gude v. Exchange Fire Ins. Co.*, 53 Minn. 220; *Home Ins. & Banking Co. v. Lewis*, 48 Tex. 622; *Abraham v. North German Ins. Co.*, 40 Fed. 717; *Martine v. International Life Assur. Soc.*, 62 Barb. (N. Y.) 181; *Tripp v. Northwestern Live-Stock Ins. Co.*, 91 Iowa, 278, 59 N. W. 1; *Dryer v. Security Fire Ins. Co.*, 94 Iowa, 471, 62 N. W. 798; *Mechem, Agency*, § 276. See post, "Statutory Regulation of Agency;" *Gore v. Canada Life Assur. Co.*, 119 Mich. 136, 77 N. W. 650.

³⁷ *Sun Fire Office v. Wich*, 6 Colo. App. 103, 39 Pac. 587; *Dryer v. Security Fire Ins. Co.*, 94 Iowa, 471, 62 N. W. 798; *German Ins. Co. v. Davis*, 40 Neb. 700, 59 N. W. 698.

³⁸ *Herman v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 153.

³⁹ *First Nat. Bank of Devils Lake v. Manchester Fire Assur. Co.*, 64 Minn. 100.

AGENT MUST BE DISINTERESTED.

§ 79. An agent cannot bind his principal by acts in his own favor.⁴⁰

The acts of an agent who represents both insurer and insured in the insuring of property are not binding on his principals unless ratified by them.⁴¹ An agent of an insurer who makes application to it for insurance on his own property, directly or indirectly for his own benefit, is acting for himself, and his acts or knowledge do not bind his principal.⁴² An insurance company is not liable on a policy written by an agent for the company on property pledged to banks of which such agent was president or cashier, where the risk was declined by the company for other reasons than the agent's interest in the property, of which fact the company was not informed, although the insured was not notified of such refusal until after the property was destroyed, where she knew of such agent's interest in the property.⁴³ But the fact that an insurance agent who issued a policy to a school district, was at the same time director of the district, will not avoid the policy, where the president, who was selected for that purpose, acted for the district in the matter and the agent did not.⁴⁴ But one who is a mere guard or watchman over property and

⁴⁰ *Neuendorff v. World Mut. Life Ins. Co.*, 69 N. Y. 389.

⁴¹ *Hartford Fire Ins. Co. v. McKenzie*, 70 Ill. App. 615; *Zimmermann v. Dwelling-House Ins. Co.*, 110 Mich. 399, 68 N. W. 215; *Mercantile Mut. Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 408; *Glens Falls Ins. Co. v. Hopkins*, 16 Ill. App. 220, 14 Ins. Law J. 317.

⁴² *Ramspeck v. Pattillo*, 104 Ga. 772, 42 L. R. A. 197; *Wildberger v. Hartford Fire Ins. Co.*, 72 Miss. 338, 28 L. R. A. 220; *Harle v. Council Bluffs Ins. Co.*, 71 Iowa, 401, 32 N. W. 396.

⁴³ *Rockford Ins. Co. v. Winfield*, 57 Kan. 576; *Idaho Forwarding Co. v. Fireman's Fund Ins. Co.*, 8 Utah, 41.

⁴⁴ *German Ins. Co. v. Independent School District*, 49 U. S. App. 271, 80 Fed. 366. As to agent acting for both with knowledge of insurer, see *Van Schoick v. Niagara Fire Ins. Co.*, 68 N. Y. 434.

also the agent of an insurance company, may, at the request of the owner, write a valid policy of insurance on such property in the company of which he is such agent.⁴⁵

DESTROYED PROPERTY.

§ 80. An agent cannot insure destroyed property.

Power is invested in agents for the promotion and protection of the interests of the principal; hence no agency, however general in its terms, embraces the power to insure property after knowledge that it has been lost.⁴⁶ Unless a binding contract of insurance is made before a loss occurs, an agent has no power to ratify an imperfect contract and issue a certificate of insurance thereafter.⁴⁷ Where one man who was agent of a mercantile company, and at the same time agent of an insurance company, is told by the manager of the former company to renew certain policies with the insurance company of which he was agent, and was authorized to use the funds of the mercantile company for that purpose, but negligently fails to do so, after having agreed to do it, no contract of insurance exists, which will cover a subsequent loss, although the agent had authority to issue the policies.⁴⁸ But an agent may, after a loss, fill up and deliver a policy which, previous to the loss, he had undertaken to execute. This is not the making but the fulfilling of a contract.⁴⁹

⁴⁵ *Northrup v. Germania Fire Ins. Co.*, 48 Wis. 420, 4 N. W. 350. See *Powers v. New England Fire Ins. Co.*, 68 Vt. 390.

⁴⁶ *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65; *People v. Dimick*, 41 Hun (N. Y.), 616; *Hartford Fire Ins. Co. v. McKenzie*, 70 Ill. App. 615.

⁴⁷ *Blake v. Hamburg Bremen Fire Ins. Co.*, 67 Tex. 160, 2 S. W. 368.

⁴⁸ *Idaho Forwarding Co. v. Fireman's Fund Ins. Co.*, 8 Utah, 41.

⁴⁹ *Franklin Fire Ins. Co. v. Colt*, 20 Wall. (U. S.) 560.

WHOM DOES AGENT REPRESENT.

§ 81. Whether a person acting in the transactions leading up to a contract of insurance is the agent of the insurer or the insured is a mixed question of law and fact, to be determined from the circumstances of each case.

It is impossible to lay down any hard and fast rule to determine whether one taking a particular part in the negotiations prior to the consummation of a contract of insurance was, in so doing, the agent of the one party or the other. The agent issuing the policy is the agent of the insurer. So are his subagents and clerks and solicitors in so far as they act in and about matters pertaining to the business of the insurer. But all these might be agents of the insurer for certain matters, and agents of the insured for other matters connected with the same transaction. Solicitors and brokers are agents of one party or the other according to their relations to the insurer or the insured, and the part they play in each particular transaction. Whether one is the agent of the insurer or the insured is a question of law for the court, or of fact for the jury, or a mixed question of law and fact, to be determined by the circumstances of each case.⁵⁰ There

⁵⁰ State v. Johnson, 43 Minn. 350; Gude v. Exchange Fire Ins. Co., 53 Minn. 220; Fame Ins. Co. v. Mann, 4 Ill. App. 485; Commercial Fire Ins. Co. v. Allen, 80 Ala. 571; Niagara Ins. Co. v. Lee, 73 Tex. 641; Harle v. Council Bluffs Ins. Co., 71 Iowa, 401, 32 N. W. 396; May v. Western Assur. Co., 27 Fed. 260; Campbell v. Supreme Lodge, K. of P., 168 Mass. 397; Smith v. Home Ins. Co., 47 Hun (N. Y.), 30; How v. Union Mut. Life Ins. Co., 80 N. Y. 32; Deitz v. Providence Washington Ins. Co., 31 W. Va. 851; Pierce v. People, 106 Ill. 11; North British & M. Ins. Co. v. Crutchfield, 108 Ind. 518; Arff v. Starr Fire Ins. Co., 125 N. Y. 57; Sullivan v. Phenix Ins. Co., 34 Kan. 170; Kausal v. Minnesota Farmers' Mut. Fire Ins. Ass'n, 31 Minn. 17; Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304; Atlantic Ins. Co. v. Carlin, 58 Md. 336; Susquehanna Mut. Fire Ins. Co. v. Cusick, 109 Pa. St. 157. In Noble v. Mitchell, 100 Ala. 519, 25 L. R. A. 238, it was held that one who placed a risk through brokers

is no general rule that a party applying to an insurance broker in respect of any matter thereby under all circumstances makes him his agent in that matter. The question of whose agent the broker is, is one of evidence in each particular case; though if all that appears is the fact of an application to him, he would very likely be regarded as the agent of the party applying to him.⁵¹ If the insured employs an insurance agent to place insurance for him, the one employed is the agent of the insured and not the agent of the insurer; but if acting on behalf of the company, or the agent of the company, the broker solicits the insurance, he is the agent of the company at least to the extent of knowledge acquired in securing the insurance and as to matters and acts necessarily incidental to his procuring the insurance.⁵²

On principle, as well as for considerations of public policy, agents of insurance companies, authorized to procure applications for insurance, and to forward them to the companies for acceptance, must be deemed the agents of the insurers and not of the insured in all that they do in preparing the application, or in any representations that they may make to the insured as to the character or effect of the statements therein

in another state acted as agent for insurer, under the statute in force in Alabama. See post, "Statutory Regulations of Agency;" "Brokers and Solicitors."

⁵¹ *Parker & Young Mfg. Co. v. Exchange Fire Ins. Co.*, 166 Mass. 484, 44 N. E. 615.

⁵² *Coles v. Jefferson Ins. Co.*, 41 W. Va. 261, 25 Ins. Law J. 247, 23 S. E. 732; *United Firemen's Ins. Co. v. Thomas* (C. C. A.), 92 Fed. 127; *Estes v. Aetna Mut. Fire Ins. Co.*, 67 N. H. 597; *McElroy v. British America Assur. Co.* (C. C. A.), 94 Fed. 990; *Gaysville Mfg. Co. v. Phoenix Mut. Fire Ins. Co.*, 67 N. H. 457; *Fromherz v. Yankton Fire Ins. Co.*, 7 S. D. 187, 63 N. W. 784; *Michigan Pipe Co. v. Michigan F. & M. Ins. Co.*, 92 Mich. 482, 20 L. R. A. 277; *John R. Davis Lumber Co. v. Hartford Fire Ins. Co.*, 95 Wis. 206, 70 N. W. 84.

contained. This rule is rendered necessary by the manner in which business is now usually done by the insurers. They supply these agents with printed blanks, stimulate them by the promise of liberal commissions, and then send them abroad in the community to solicit insurance. The companies employ them for that purpose, and the public regard them as the agents of the companies in the matter of preparing and filling up the applications—a fact which the companies perfectly understand. The parties who are induced by these agents to make applications for insurance rarely know anything about the general officers of the company, or its constitution or by-laws, but look to the agent as its full and complete representative in all that is said or done in regard to the application. And in view of the apparent authority with which the companies clothe these solicitors, they have a perfect right to consider them such.⁵³ An insurance agent, who, in pursuance of general directions given him by the owners of property, procures a second policy on the same from a company not represented by him, through an agent who was in the habit of exchanging policies with him, and who charged the premiums to him, acts in getting insurance solely as the agent of the property owners.^{53a} In *McGraw v. Germania Fire Ins. Co.*, application was made to agents for insurance.

⁵³ *American Life Ins. Co. v. Mahone*, 21 Wall. (U. S.) 152; *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465; *Hough v. City Fire Ins. Co.*, 29 Conn. 10; *Woodbury Savings Bank & Building Ass'n v. Charter Oak F. & M. Ins. Co.*, 31 Conn. 517; *Miner v. Phoenix Ins. Co.*, 27 Wis. 693; *Winans v. Allemania Fire Ins. Co.*, 38 Wis. 342; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Brandup v. St. Paul F. & M. Ins. Co.*, 27 Minn. 393, 2 Am. Lead. Cas. (5th Ed.) 917 et seq.; *Wood, Ins. c. 12*; *May, Ins. §§ 120, 139*; *Kausal v. Minnesota Farmers' Mut. Fire Ins. Ass'n*, 31 Minn. 17. But see *Northrup v. Piza*, 43 App. Div. 284, 60 N. Y. Supp. 363.

^{53a} *Merchants' Ins. Co. v. Union Ins. Co.*, 162 Ill. 173.

They were unable to place the whole amount desired in companies which they represented and went to the agent of other companies from whom they obtained the balance. They made to such agent verbal representations regarding the conditions of the property on which insurance was desired. With these representations insured was not concerned. In an action on a policy, thus procured by such agents, it was held that they were the agents of the company, not of insured, and the policy could not be avoided on account of the falsity of representations made by them.⁵⁴

STATUTORY REGULATION OF AGENCY.

§ 82. It is within the power of a state to fix the status of those acting as solicitors or brokers or taking any steps towards the procuring or issuing of an insurance policy.

Such statutory regulations supersede any stipulations or agreements of the parties to the contrary.

Statutes imposing civil or criminal liability upon agents of a foreign insurance company doing business within a state without license are valid.

Such statutes are strictly construed against agents.

Several states have passed laws to the effect that "whoever solicits, procures, or receives in or transmits from any state

⁵⁴ 54 Mich. 145; *Michigan Pipe Co. v. Michigan F. & M. Ins. Co.*, 92 Mich. 482, 20 L. R. A. 277. In *May v. Western Assur. Co.*, 27 Fed. 260, plaintiff made application to B. for insurance. They had dealt with each other for years, and B. knew the condition of the property. He was unwilling to carry the full amount asked for in companies he represented, and applied to C., agent of another company, for a portion of it. Without communicating with plaintiff and without knowledge concerning the property, C. took the risk, issued a policy, and delivered it to B., and he to A. The court held that plaintiff and B. acted as principals; that if C. chose to act upon representations made by B. whom he regarded as a subagent, his principal was bound. See, also, *Mesterman v. Home Mut. Ins. Co.*, 5 Wash. 524, 34 Am. St. Rep. 877.

any application other than his own for membership or insurance in any corporation or association shall be deemed and held to be the agent of such corporation or association.”⁵⁵ The purpose of these statutes is to settle, as between the parties to the contract of insurance, the relations of the agents through whom the negotiations were conducted. Many insurance companies provide in their applications and policies, that the agent through whom the application was procured, shall be the agent of the insured. Under that provision they are able to avail themselves, in case of loss, of defenses which would not have been available if the solicitor had been regarded as their agent. Thence arise cases of apparent hardship and injustice. That is the evil which is intended to be remedied by these statutes, and they ought to be so interpreted as to accomplish that result. These statutes are constitutional.⁵⁶ The power with which persons authorized

⁵⁵ Joyce, Ins. § 512 et seq.; Gen. St. Conn. 1888, §§ 2898, 2923; Ga. Laws 1887, p. 121, § 9; McLain's Iowa Code 1888, § 1732; Rev. St. Maine 1883, p. 445, § 19; Acts Mass. 1887, c. 214, § 87; Ann. Code Miss. 1892, § 2327; Rev. St. Mo. 1889, § 5915; Comp. St. Neb. 1891, c. 16, § 8; Laws N. H. 1889, c. 94, § 2; Laws N. Dak. 1891, p. 203, § 28; Rev. St. Ohio, Smith & B. 1890, § 3644; St. Okla. 1890, p. 637, § 23; Pub. Laws R. I. Jan. 1884, p. 55; Id. Jan. 1885, p. 63; St. S. C. 1883, p. 460, § 6; Rev. Laws Vt. 1880, § 3620, p. 697; Acts Va. 1887, p. 349, c. 271, § 5; Sanb. & B. Ann. Wis. St. 1889, Vol. 1, p. 1186, § 1977; Laws Minn. 1895, c. 175, §§ 25, 88, 91; Rev. St. Tex. 1895, art. 3093; Code Ala. § 1205. For statutory regulation of adjusters of foreign unlicensed insurance companies, see *French v. People*, 6 Colo. App. 311, 40 Pac. 463, where the court held that construction of the statute which would punish a professional adjuster exercising his vocation anywhere would make such statute void. See, also, *People v. Gilbert*, 44 Hun (N. Y.), 522.

⁵⁶ *Cook v. Federal Life Ass'n*, 74 Iowa, 746, 35 N. W. 500; *St. Paul F. & M. Ins. Co. v. Shaver*, 76 Iowa, 282, 41 N. W. 19; *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304; *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Noble v. Mitchell*, 164 U. S. 367, 100 Ala. 519, 25 L. R. A. 238; *Hooper v. California*, 155 U. S. 648; *List v. Com.*, 118 Pa. St. 322; *German Ins. Co. v. Everett (Tex.)*, 36 S. W. 125.

by an insurance company to solicit insurance or receive premiums, and declared by statute to be the agents of the company to all intents and purposes, are invested by law for the protection of the public, cannot be limited by a clause in the application, providing that no statements, representations, promises or information given to such person shall be binding on the company, or affect its rights, unless reduced to writing and presented to the officers of the company at its home office. Any information given by an applicant to such agents is in contemplation of law given to the company itself, and prevents a defense on the grounds that it is not set out in the application. The knowledge of such an agent is imputed to his principal.⁵⁷

The rule that insured must know at his peril whether the person with whom he is negotiating as an agent has the authority he assumes to exercise, is changed by such a statute; and an insurance company is responsible for the acts of a person who assumes to represent it by soliciting insurance if it issue a policy, or otherwise it accepts, adopts, or takes advantage of his acts.⁵⁸ And under such statutes a company is bound by a policy issued by its agent in territory wherein the agent was forbidden to insure.⁵⁹ An oral contract for immediate insurance is within the powers of such an agent not-

⁵⁷ *New York Life Ins. Co. v. Russell* (C. C. A.), 77 Fed. 94; *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136; *St. Paul F. & M. Ins. Co. v. Shaver*, 76 Iowa, 282; *Marston v. Kennebec Mut. Life Ins. Co.*, 89 Me. 266, 36 Atl. 389; *Bennett v. Council Bluffs Ins. Co.*, 70 Iowa, 600; *Wood v. Firemen's Fire Ins. Co.*, 126 Mass. 316 (contra). And see *John R. Davis Lumber Co. v. Hartford Fire Ins. Co.*, 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131; *United Firemen's Ins. Co. v. Thomas* (C. C. A.), 92 Fed. 127.

⁵⁸ *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136; *Body v. Hartford Fire Ins. Co.*, 63 Wis. 157, and cases in note 57.

⁵⁹ *Knox v. Lycoming Fire Ins. Co.*, 50 Wis. 671; *German Ins. Co. v. Everett* (Tex.), 36 S. W. 125.

withstanding a stipulation in the application (which insured signed without knowing its contents) that the insurer would not be liable until the application and premium were received by its secretary.⁶⁰ An insurance broker employed by an insured to procure insurance is the latter's agent in respect to everything that does not conflict with his agency for the insurer as declared by statute, and he may bind the insured in matters pertaining to the procurement of the policy.⁶¹

Validity and Enforcement of Penal Statutes.

A state can lawfully punish or regulate, by the imposition of civil liability or otherwise, the doing, by agents of a foreign insurance company within its territory, of acts which are calculated to neutralize and make ineffective a statute prescribing conditions precedent to the right of such corporation to do business within the state; and it can make an agent liable personally to the insured for a loss covered by a policy issued by the agent of a company not entitled to do business in the state.⁶² The fact that an insurance solicitor placed a risk through brokers in another state, without knowing what com-

⁶⁰ *Mathers v. Union Mut. Acc. Ass'n*, 78 Wis. 588, 47 N. W. 1130, 11 L. R. A. 83. Compare *Ebert v. Mutual Reserve Fund Life Ass'n*, 81 Minn. 116, 83 N. W. 507.

⁶¹ *John R. Davis Lumber Co. v. Hartford Fire Ins. Co.*, 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131, 2 Am. & Eng. Enc. Law (1st Ed.), 595; *Wood v. Firemen's Ins. Co.*, 126 Mass. 316.

⁶² *Noble v. Mitchell*, 164 U. S. 367, 17 Sup. Ct. 110; *Hooper v. California*, 155 U. S. 648; *Seamans v. Knapp-Stout & Co. Company*, 89 Wis. 171, 61 N. W. 757; *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304; *Indiana Millers' Mut. Fire Ins. Co. v. People*, 65 Ill. App. 355; *Parker v. Lamb*, 99 Iowa, 265, 68 N. W. 686; *State v. Stone*, 118 Mo. 388. For prosecutions under such statutes, see *People v. Howard*, 50 Mich. 239, 15 N. W. 101; *State v. Johnson*, 43 Minn. 350; *French v. People*, 6 Colo. App. 311, 40 Pac. 463; *People v. Gilbert*, 44 Hun (N. Y.), 522; *State v. Farmer*, 49 Wis. 459, 5 N. W. 892.

pany took it, will not release him from liability under the provisions of such a statute. In a Minnesota case, the procuring of a single policy through brokers was held not "acting as agent" for the company issuing the policy.⁶³ In a prosecution against the agent of a foreign insurance company for acting as agent without the proper certificate of the Insurance Commission it was held immaterial and no defense that the company he represented had complied with the statute.⁶⁴ Under Illinois Act 1869, making it unlawful for any agent or agents, or any other person in any manner, to aid an insurance company, not incorporated in the state, and not entitled to do an insurance business therein, a person or corporation is liable for aiding such foreign insurance company in the transaction of insurance business in any manner, although not the agent of the company in the ordinary sense of the term, and although acting under a contract with the insured expressly stating that such person or corporation is his agent only.⁶⁵ And one whose business is to negotiate insurance in domestic companies acts as an insurance broker in informing a duly licensed agent of foreign companies that certain persons desire to obtain insurance on their lives, within Mass. Stat. 1887, ch. 214, §§ 93-98, providing that whoever for compensation "acts, or aids in any manner," in negotiating contracts of insurance shall be deemed an insurance broker and no person shall act as such broker without procuring a license therefor.⁶⁶

⁶³ *Noble v. Mitchell*, 100 Ala. 519, 25 L. R. A. 238, 164 U. S. 367; post, note 64.

⁶⁴ *State v. Johnson*, 43 Minn. 350.

⁶⁵ *People v. Peoples' Ins. Exchange*, 126 Ill. 466, 2 L. R. A. 340; *Pierce v. People*, 106 Ill. 18.

⁶⁶ *Pratt v. Burdon*, 168 Mass. 596, 47 N. E. 419. As to what constitutes doing business under such statutes, see *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739; *State v. Johnson*, 43 Minn. 350.

EVIDENCE OF AGENCY.

§ 83. Authority of an agent to act for an insurer may be shown by the acts and conduct of the parties as well as by proof of direct authority.

The delivery of blank policies and renewal receipts by an insurer to an agent to be by the latter filled in and issued shows the authority of the agent to represent the insurer in all matters connected with soliciting insurance and issuing, canceling, and renewing policies.

The admissions of the officers and general agents of the insurer, while acting within the line of their duty, as to the authority of an agent are evidence of the same.

There is no presumption concerning the existence or extent of an agent's authority. Neither an individual nor a corporation can be bound by the acts of an alleged agent without proof of the agency. Whether the relation of principal and agent exists between the two parties is generally a question of fact. But where facts are undisputed, or the evidence is such that only one inference or conclusion can properly and reasonably be drawn from them, it then becomes the province and duty of a court to determine whether they create any agency, and if so, with what powers and limitations. This is true whether the agency is sought to be established by previous direct authorization, or by the course of conduct and dealings of the parties before the act alleged, or by subsequent ratification. And while it is not always necessary to prove an express contract between the parties in order to establish the relation of principal and agent, either that must be done, or the acts, dealings and conduct of the parties must be proved to be of such a nature that the relation may properly be inferred therefrom. An exception to this rule exists of course where the agency is created by statute.⁶⁷

⁶⁷ Ante, note 1.

Acts and Conduct of Parties.

It may be stated as a general rule that wherever an insurance company holds one out to the public as its agent, or knowingly permits one to act as its agent without dissent, or where the course of dealing between the agent and insurer has been such as to warrant the reasonable presumption of authority in the agent, the insurance company will not be heard to deny authority in such agent so as to affect the rights of third parties who have relied and acted thereon in good faith and with reasonable prudence.⁶⁸ Aside from any other facts the authority of an agent to act for an insurer may be inferred from the course of dealing between them, and evidence that the agent assumed to act for the insurer with its knowledge, but without its dissent, is sufficient.⁶⁹ But such authority cannot be inferred from the acts, statements, or representations of the agent alone though he assumed to act for the

⁶⁸ *Hamilton v. Home Ins. Co.*, 94 Mo. 353; *Fay v. Richmond*, 43 Vt. 25; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645; *Lungstrass v. German Ins. Co.*, 57 Mo. 107; *Indiana, B. & W. Ry. Co. v. Adamson*, 114 Ind. 282; *Woodbury Sav. Bank & Bldg. Ass'n v. Charter Oak F. & M. Ins. Co.*, 31 Conn. 518; *Lightbody v. North American Ins. Co.*, 23 Wend. (N. Y.) 18. In *McArthur v. Home Life Ass'n*, 73 Iowa, 336, 35 N. W. 430, the court held the insurer bound by the act of one who claimed to be its agent, who forged some of the papers in an application on which a policy was issued by the company and altered by the agent, where the premium was paid by the insured without knowledge of the fraudulent acts of the agent. An insurance company is estopped to deny that one sent out by it to solicit business for it is its agent, although the policy provides that no person, unless authorized in writing, shall be deemed to be its agent. *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 27 L. R. A. 86; *Spitz v. Mutual Ben. Life Ass'n*, 5 Misc. Rep. 245, 25 N. Y. Supp. 469.

⁶⁹ *Newman v. Springfield F. & M. Ins. Co.*, 17 Minn. 123 (Gil. 98); *Guernsey v. American Ins. Co.*, 17 Minn. 104 (Gil. 85); *Day v. Mechanics' & Traders' Ins. Co.*, 88 Mo. 325; *Flynn v. Equitable Life Ins. Co.*, 78 N. Y. 568; *Mechem, Agency*, §§ 84, 276; *Connecticut Mut. Life Ins. Co. v. Bulte*, 45 Mich. 113.

insurer.⁷⁰ Proof of ratification or adoption of an unauthorized act by an agent must show that the action of the principal was taken with full knowledge of the acts of the agent.⁷¹ Where defendant's cashier made representations to a policy holder in its office on a matter relating to the business of the corporation which were designed to, and did, affect an act beneficial to it, and which was acted on by it, it was held in the absence of proof as to the cashier's authority, that there was *prima facie* evidence of his authority to bind his principal.⁷² And where the secretary of an insurance company gave his assent to the assignment of a policy, his authority to do so can be presumed.⁷³ The appointment of an officer who acts publicly as such in connexion with corporate affairs, can be assumed in the absence of anything warranting a contrary inference.⁷⁴ In *Enos v. St. Paul F. & M. Ins. Co.*, the supreme court of South Dakota held that when in a suit against an insurer, its answer alleged that it had caused an examination of the insured to be had after the loss, and the evidence showed that at such examination a person appeared, claimed to represent the company and conducted such examination apparently for it, and afterwards in reply

⁷⁰ Cases *supra*; *Huesinkveld v. St. Paul F. & M. Ins. Co.* (Iowa), 76 N. W. 696; *Marvin v. Wilber*, 52 N. Y. 270; *Reynolds v. Continental Ins. Co.*, 36 Mich. 131; *Graves v. Horton*, 38 Minn. 66; *Fleming v. Hartford Fire Ins. Co.*, 42 Wis. 616; *Rahr v. Manchester Fire Assur. Co.*, 93 Wis. 355, 67 N. W. 725.

⁷¹ *Morse v. St. Paul F. & M. Ins. Co.*, 21 Minn. 407. See post, § 119.

⁷² *Knauer v. Globe Mut. Life Ins. Co.*, 16 Jones & S. (N. Y.) 454; *Abraham v. North German Ins. Co.*, 40 Fed. 717.

⁷³ *Conover v. Mutual Ins. Co.*, 3 Denio (N. Y.), 254.

⁷⁴ *Bank of U. S. v. Dandridge*, 12 Wheat. (U. S.) 89; *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 644; *Fayles v. National Ins. Co.*, 49 Mo. 380; *Aetna Ins. Co. v. Maguire*, 51 Ill. 342; *Indiana B. & W. Ry. Co. v. Adamson*, 114 Ind. 282.

to a letter from the assured to the company in regard to such examination, the same person wrote an answer, purporting to be that of the company, written on one of its letter heads, on which such person was advertised as the adjuster of the company, the jury might properly find that such person was the agent of the company.⁷⁵

Possession of Blank Policies as Evidence of Agency.

Where an insurance company entrusts to an agent blank policies, and renewal receipts, signed by its president and secretary, to be filled up by such agent when issued, it constitutes him its agent for the purpose of soliciting and procuring insurance and issuing policies for it thereon and renewing the same, and all matters connected therewith, and it cannot question the general authority of the agent to act for it in those particulars.⁷⁶

Admissions of Officers and Agents.

The authority of an agent cannot be proved by the mere declarations or admissions of the agent himself; but he is a competent witness upon a trial to testify to the existence of facts which constitute the agency. The agency and power of a subordinate may sometimes be proven by the declarations and admissions made by a managing agent while acting within the scope of his agency and when they relate to the subject or

⁷⁵ 4 S. D. 639, 57 N. W. 919; *Slater v. Capital Ins. Co.*, 89 Iowa, 628, 57 N. W. 422.

⁷⁶ *Carroll v. Charter Oak Ins. Co.*, 40 Barb. (N. Y.) 292; *Union Ins. Co. v. McGookey*, 33 Ohio St. 555; *Train v. Holland Purchase Ins. Co.*, 68 N. Y. 208; *Howard Ins. v. Owen's Adm'rs*, 94 Ky. 197. But see *More v. New York Bowery Fire Ins. Co.*, 130 N. Y. 537, 29 N. E. 757, where the court held insurer was not bound by an oral contract of its agent to insure where the agent told plaintiff that his powers were limited to taking and forwarding applications for approval or rejection of the company.

matters with reference to which he was empowered to act for his principal. Thus, the affidavit of the president of an insurance company made to procure a continuance in an action on account of the absence of a witness, is competent evidence against the company of the facts stated therein, viz.: that the witness mentioned in the affidavit was as stated therein its agent with the powers claimed for him by the president in the affidavit.⁷⁷

APPOINTMENT OF AGENTS.

§ 84. No unusual formalities are required in the appointment of agents of insurance companies unless prescribed by statute or required by the charter or by-laws of the company.

One may become the agent of an insurance company with greater or less power according to the circumstances of the given case (1) by virtue of a special contract either oral or written; (2) by virtue of some general principle of the law of agency; (3) by custom and course of dealing between him and the insurer; (4) by his assuming to act for the insurer with its knowledge and without its dissent; (5) by the insurer adopting an agent's unauthorized action on its behalf; (6) by an insurer holding him out as its agent or clothing him with apparent power to represent it; (7) by virtue of some provision in the application or policy furnished by the insurer; (8) through some statutory provision; (9) through some provision of an insurer's charter or by-laws vesting specific powers in certain officers or other persons collectively or individually; (10) *ex necessitate*.⁷⁸ In case of foreign insur-

⁷⁷ Schreiber v. German-American Hail Ins. Co., 43 Minn. 367; Cotton States Life Ins. Co. v. Edwards, 74 Ga. 220; Bartlett v. Firemen's Fund Ins. Co., 77 Iowa, 155, 41 N. W. 601; Mechem, Agency, § 102; Scott v. Home Ins. Co., 53 Wis. 238, 10 N. W. 387; Agricultural Ins. Co. v. Potts, 55 N. J. Law, 158, 39 Am. St. Rep. 637.

⁷⁸ Perkins v. Washington Ins. Co., 4 Cow. (N. Y.) 646; Joyce, Ins.

ance companies, the statutes of many states impose conditions regulating the appointment of their agents within the state, and require the appointment of agents upon whom service of process may be made in suits against such companies. Some states prohibit the agents of foreign insurance companies doing business within a state without procuring from the commissioner of insurance a certificate of authority. A foreign corporation cannot enforce any contracts made by it or its agents where the law has not been obeyed;⁷⁹ but such contracts can be enforced against the insurer.⁸⁰

CLASSIFICATION OF AGENTS.

§ 85. The agents here considered are either

- (a) General agents.
- (b) Officers of the insurer, or
- (c) Special or local agents.

Insurance agents are (1) general; or (2) officers of the insurer; or (3) special with either plenary or limited powers, depending upon the terms of the grant of their power and upon the authority exercised by them with the assent of their principals. The nature of the agency and the extent of an agent's powers are to be determined by the same rules that control in respect to other agencies. An insurer may limit

§§ 390 et seq., 408; *Emery v. Boston Marine Ins. Co.*, 138 Mass. 398; *Independent Mut. Ins. Co. v. Agnew*, 34 Pa. St. 96; *Greenleaf v. Moody*, 13 Allen (Mass.), 363; *Witherell v. Maine Ins. Co.*, 49 Me. 200; *Newmark v. Liverpool & L. F. & L. Ins. Co.*, 30 Mo. 160; *Leiber v. Liverpool, L. & G. Ins. Co.*, 6 Bush (Ky.), 639; *Goodwillie v. McCarthy*, 45 Ill. 186; *Bradford v. Homestead Fire Ins. Co.*, 54 Iowa, 598, 7 N. W. 48; *Pacific Mut. Ins. Co. v. Frank*, 44 Neb. 320, 62 N. W. 454; *Fayles v. National Ins. Co.*, 49 Mo. 380; *Mound City Mut. Life Ins. Co. v. Huth*, 49 Ala. 529.

⁷⁹ *McCanna & Fraser Co. v. Citizens' T. & S. Co. (C. C. A.)*, 76 Fed. 420, 35 L. R. A. 236; *Randall v. Tuell*, 89 Me. 443, 38 L. R. A. 143; *Seamans v. Christian Bros. Mill. Co.*, 66 Minn. 205, 68 N. W. 1065.

⁸⁰ *Ganser v. Fireman's Fund Ins. Co.*, 34 Minn. 372, 25 N. W. 943.

the powers of its agents, and when either actual knowledge of a limitation on an agent's power or such notice thereof as a prudent man is bound to regard, is brought home to the insured, he is estopped from claiming that such limitation does not exist, and from asserting in the agent powers in opposition to such limitation.⁸¹

SAME — GENERAL AGENTS.

§ 86. A general agent of an insurance company is one who has all the powers of his principal in relation to those matters in which he represents his principal.

The insurer is bound by the knowledge of and notice to its general agent.

A general agent has the power to institute civil proceedings to collect money due his principal. As to his power to institute criminal prosecutions, *quære*.

Who is a General Agent.

The term "general agent," in insurance matters, is often used with reference to the geographical extent of an agent's authority, in contradistinction to a "special" or "local" agent who may have equal powers within a more limited area. Whether an agent belongs to one class or the other is often a question of fact depending on all the circumstances and surroundings of the case and the parties. Strictly speaking the term "general agent" is descriptive of one who stands in the place of a representative or officer of a company. Such an agent may generally make the contract which the insurer is empowered to make.⁸² An agent who is intrusted with

⁸¹ *Weidert v. State Ins. Co.*, 19 Or. 261, 20 Am. St. Rep. 809. "An universal agent is one authorized to transact all of the business of his principal of every kind. A general agent is an agent who is empowered to transact all of the business of his principal of a particular kind or in a particular place. A special agent is one authorized to act only in a specific transaction." *Mechem, Agency*, § 6.

⁸² *Ewell's Evans, Agency*, p. 21; *Thompson, Corp.* § 4878.

the management of the company's affairs in a state is a general agent, though his powers be restricted to a single state.⁸³ An agent authorized to receive and accept proposals for risks, subject to the approval of the company, to issue and deliver policies, and renew the same, and receive premiums therefor, who has been supplied with blanks signed by the president to be filled and countersigned, is a general agent.⁸⁴ Likewise an agent authorized to issue and renew policies, and to transact the business of the insurer at a particular place.⁸⁵

⁸³ *Southern Life Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606; *Hartford L. & A. Ins. Co. v. Hayden's Adm'r*, 90 Ky. 39; *Boehen v. Williamsburg City Ins. Co.*, 35 N. Y. 131; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 27 N. E. 77.

⁸⁴ *Georgia Home Ins. Co. v. Kinnier's Adm'x*, 28 Grat. (Va.) 88; *Painter v. Industrial Life Ass'n*, 131 Ind. 68; *German Ins. Co. v. Gray*, 43 Kan. 497; *Phenix Ins. Co. v. Munger*, 49 Kan. 178; *Millville Mut. M. & F. Ins. Co. v. Mechanics' & W. B. & L. Ass'n*, 43 N. J. Law, 652; *King v. Council Bluffs Ins. Co.*, 72 Iowa, 310; *West v. Norwich Union F. Ins. Co.*, 10 Utah, 448; *Howard Ins. Co. v. Owen's Adm'rs*, 94 Ky. 197; *Newark Machine Co. v. Kenton Ins. Co.*, 50 Ohio St. 558; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; *Goode v. Georgia Home Ins. Co.*, 92 Va. 392, 30 L. R. A. 842; *Hartford Fire Ins. Co. v. Orr*, 56 Ill. App. 629; *Harding v. Norwich Union F. Ins. Co.*, 10 S. D. 64, 71 N. W. 755. "It is clear that a person authorized to accept risks, to agree upon and settle the terms of insurance and to carry them into effect by issuing and renewing policies, must be regarded as the general agent of the company." *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 6. See, also, *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 359; *Carroll v. Charter Oak Ins. Co.*, 40 Barb. (N. Y.) 292; *Lightbody v. North American Ins. Co.*, 23 Wend. (N. Y.) 18; *McEwen v. Montgomery County Mut. Ins. Co.*, 5 Hill (N. Y.), 105; *Gloucester Mfg. Co. v. Howard Fire Ins. Co.*, 5 Gray (Mass.), 498; *Krumm v. Jefferson Ins. Co.*, 40 Ohio St. 225. The part of the opinion in *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 6, above quoted, is made part of the text in *May, Ins.* § 126. See, also, § 129.

⁸⁵ *Pitney v. Glen's Falls Ins. Co.*, 61 Barb. (N. Y.) 335, 65 N. Y. 6; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364; *Travelers' Ins. Co. v. Harvey*, 82 Va. 949; *Cole v. Union Cent. Life Ins. Co.* (Wash.), 60 Pac. 68, 47 L. R. A. 204.

Powers of General Agent.

The absolute powers of a general agent of an insurance company are difficult of precise definition. They vary in different cases according to the power given the agent by his principal, the power which the agent assumes to exercise with the acquiescence of the principal, the distance between the agency and the home office, the customs of the business in the locality in which the agency is situated, and the necessities and surroundings of the given case.⁸⁶ While he cannot dispense with or modify the essential character or substance of the contract, he can, even in the case of a mutual company where greater strictness is sometimes required, determine as to the amount and nature of the risk and the rate of premium. He may make such memoranda and indorsements modifying the general provisions of the policy, and even inconsistent therewith as in his discretion seems proper, before the policy is delivered and accepted. He may also insert by memorandum or indorsement a description of the property insured, inconsistent with the description of the same contained in the application. His acts and knowledge are those of his principal. He may appoint and employ sub-agents, adjusters, and appraisers if necessary, for the furtherance of the interests of his principal.⁸⁷ A general agent of a foreign insur-

⁸⁶ See ante, "General Agents;" *Eclectic Life Ins. Co. v. Fahrenkrug*, 68 Ill. 463; *Travellers' Ins. Co. v. Edwards*, 122 U. S. 457; *McGurk v. Metropolitan Life Ins. Co.*, 56 Conn. 528; *Eastern R. Co. v. Relief Fire Ins. Co.*, 105 Mass. 570; *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 235; *Lungstrass v. German Ins. Co.*, 57 Mo. 107; *Jervis v. Hoyt*, 2 Hun (N. Y.), 637; *Greenleaf v. Moody*, 13 Allen (Mass.), 363.

⁸⁷ *Biddle, Ins.* §§ 116, 121; *Eastern R. Co. v. Relief Fire Ins. Co.*, 105 Mass. 570; *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364; *Manhattan Fire Ins. Co. v. Weill Ullman*, 28 Grat. (Va.) 389; *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 6; *Harding v. Norwich Union F. Ins. Soc.*, 10 S. D. 64, 71

ance company doing business in Canada will be deemed to be possessed of all the powers of an agent at the head office of the company.⁸⁸ Whatever he does and says in soliciting, issuing and delivering policies and collecting premiums has the same effect as if done by the company itself, even though it may be contrary to his special instructions of which the other party had no notice.⁸⁹ Thus a policy issued upon subject matter beyond the territory in which a general agent is authorized to act, is valid unless the want of authority is brought home to the insured.⁹⁰ And a general agent may, in the absence of a known restriction upon his authority, bind his principal by delivering a policy without requiring payment of the premium, notwithstanding that the application signed by the insured provided that the policy should not be binding upon the company until the cash premium was received by it or its agent during the lifetime of the person assured.⁹¹ He has authority to adjust and settle losses and waive proofs of loss;⁹² and to bind his principal by a contract of employment for the solicitation of risks, unless the person employed had

N. W. 755; *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236. But see *Gore v. Canada Life Assur. Co.*, 119 Mich. 136, 77 N. W. 650.

⁸⁸ *Campbell v. National Life Ins. Co.*, 24 Up. Can. C. P. 133.

⁸⁹ *Fireman's Fund Ins. Co. v. Norwood (C. C. A.)*, 69 Fed. 71; *Story, Agency*, §§ 18, 126 et seq.; *Biddle, Ins.* §§ 116-121; *Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 421; *Georgia Home Ins. Co. v. Kinnier's Adm'x*, 28 Grat. (Va.) 88. Post, "Collection of Premiums."

⁹⁰ *Lightbody v. North American Ins. Co.*, 23 Wend. (N. Y.) 18.

⁹¹ *Southern Life Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606; *Cole v. Union Cent. Ins. Co. (Wash.)*, 60 Pac. 68, 47 L. R. A. 204. But see post, notes 268 et seq.

⁹² *Little v. Phoenix Ins. Co.*, 123 Mass. 380; *Travelers' Ins. Co. v. Harvey*, 82 Va. 949; *German Ins. Co. v. Gray*, 43 Kan. 497; *Swain v. Agricultural Ins. Co.*, 37 Minn. 390. Post, "Waiver of Proofs of Loss."

notice of private restrictions upon the agent's authority.⁹³ A statement by a general agent of a corporation in the course of his employment as to a fact within his official knowledge, touching the status of a matter intrusted to him is admissible in evidence on behalf of the party with whom the corporation was dealing at the time.⁹⁴ He may orally consent to contemporary insurance on the property in another company, notwithstanding a prohibition in the policy against taking additional insurance without written consent indorsed on the policy. He can dispense with a condition orally though the policy requires it to be in writing.⁹⁵ And may waive a condition inserted in the policy issued by his company.⁹⁶ He has authority to demand an appraisal and may waive the same after it has been made;⁹⁷ but he cannot bind the company by an agreement to receive a less premium than that fixed by the policy.⁹⁸

An insurance company is bound by the knowledge of its general agent concerning the title to the insured property and by his act in issuing a policy thereon without a written appli-

⁹³ *Equitable Life Assur. Co. v. Brobst*, 18 Neb. 526. Post, "Sub-agents."

⁹⁴ *Agricultural Ins. Co. v. Potts*, 55 N. J. Law, 158, 39 Am. St. Rep. 637; ante, note 77.

⁹⁵ *Coles v. Jefferson Ins. Co.*, 41 W. Va. 261, 23 S. E. 732; *Goldwater v. Liverpool & L. & G. Ins. Co.*, 39 Hun (N. Y.), 176; *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 315. Can waive method of waiver and binds company by his construction. *Carrigan v. Lycoming Fire Ins. Co.*, 53 Vt. 418.

⁹⁶ *Kruger v. Western F. & M. Ins. Co.*, 72 Cal. 91, 1 Am. St. Rep. 42; *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. St. 460, 2 Am. St. Rep. 686. Post, note 198.

⁹⁷ *Northern Assur. Co. v. Samuels*, 11 Tex. Civ. App. 417, 33 S. W. 239.

⁹⁸ *Brown v. Massachusetts Mut. Life Ins. Co.*, 59 N. H. 298, 47 Am. Rep. 205. Post, notes 259-270.

cation;⁹⁹ and is chargeable with the knowledge of its general agent concerning the custom of receiving premiums after they become due.¹⁰⁰ Notice to a general agent of an insurer, of a sale, or conveyance, or change of possession of property insured, and a waiver by him of the condition of the policy of the company against it, bind the company.¹⁰¹

Power of General Agent to Institute Civil or Criminal Proceedings.

The institution of civil proceedings to collect money due his principal is within the scope of the agency of a general agent of an insurance company; but it is more than doubtful whether the institution of criminal proceedings on behalf of his principal against embezzling sub-agents, employed by the general agent and personally liable to him, would under any circumstances be within the scope of his agency. An insurance company is not liable for the torts of its general agent in the course of and within the scope of his agency, without its participation, ratification or direct authority, when the tortious act was committed for a purpose at least partially personal to the agent.¹⁰² But in Michigan it was held that a general agent for a district embracing several states had such authority in any one of them, though his office be in another, as will make his principal liable for a malicious prosecution in its name with his connivance in either state.¹⁰³

⁹⁹ *Liverpool & L. & G. Ins. Co. v. Ende*, 65 Tex. 118.

¹⁰⁰ *Phoenix Mut. Life Ins. Co. v. Hinesley*, 75 Ind. 1; *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Miller v. Mutual Ben. Life Ins. Co.*, 31 Iowa, 216.

¹⁰¹ *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236; *Millville Mut. M. & F. Ins. Co. v. Mechanics' & W. B. & L. Ass'n*, 43 N. J. Law, 652.

¹⁰² *Larson v. Fidelity Mut. Life Ass'n*, 71 Minn. 101, 73 N. W. 711; *Norman v. Insurance Co. of North America (Ill.)*, 4 Ins. Law J. 827.

¹⁰³ *Turner v. Phoenix Ins. Co.*, 55 Mich. 236, 21 N. W. 326.

Acts Not Within Scope of Power of General Agent—Illustrations.

General authority given an agent to issue policies and contracts of reinsurance throughout the country in cases where a Lloyd's Association has a similar amount of insurance on the same risk, does not include authority to reinsure a Lloyd's Association of which he is the general attorney, against one half of a risk which the latter has outstanding.¹⁰⁴ When an insurance company rejects an application after part of the premium has been paid to one of its general agents, and the agent by arrangement with the applicant retains the premium note given, and the cash paid, and attempts to induce the company to reconsider its action, the company is not liable for loss occurring after it had rejected the application.¹⁰⁵ An insurance company is not liable for advertising bills contracted by its general agent without special authority in the absence of a custom giving him power to contract such debts on behalf of his principal.¹⁰⁶

OFFICERS OF INSURER AS AGENTS.

§ 87. The officers of an insurance company are its agents, and are governed by the rules applicable to other agents.

Since a corporation must perform all its acts through its officers primarily and the agents appointed by them, it follows that in the sum total of the powers of the officers must be found the authority to discharge all the corporate functions. The powers of the different officers are fixed by the provisions of the charter or articles of incorporation and the constitution and by-laws together with the statutory enactments of the place of incorporation and of the *lex loci contractus*. It is ele-

¹⁰⁴ *Timberlake v. Beardsley*, 22 App. Div. (N. Y.) 439.

¹⁰⁵ *Otterbein v. Iowa State Ins. Co.*, 57 Iowa, 274.

¹⁰⁶ *United States Life Ins. Co. v. Advance Co.*, 80 Ill. 549.

mental that everyone is held to know the statutory and written law regulating the acts of the corporation and its agents. The authority of an officer to bind an insurer must be shown by the party asserting it.¹⁰⁷ And an insurance company is not bound by notice coming to the knowledge of its president unless he is shown to have authority to act for it in the premises.¹⁰⁸ The power to represent absent members and vote in their behalf, expressly conferred upon the board of directors, involves the exercise of discretion, and cannot be delegated except under express grant of authority.¹⁰⁹

SAME — ACTS, ADMISSIONS, AND DECLARATIONS.

§ 88. The acts, admissions, declarations and representations of an officer acting within the scope of his authority bind the company.

Admissions made by the treasurer and secretary within the scope of their authority bind the company as do all representations made by them.¹¹⁰ The knowledge of the president binds the company if received within the line of his duty,¹¹¹ and representations made by the cashier of an insurer,¹¹² and the admissions of the president or manager;¹¹³ but hearsay information received by an officer of a company upon or concerning matters not within the scope of his powers and duties,

¹⁰⁷ Ante, §§ 69-72.

¹⁰⁸ *Home Insurance & Banking Co. v. Lewis*, 48 Tex. 622; *Tripp v. Northwestern Live Stock Ins. Co.*, 91 Iowa, 278, 59 N. W. 1.

¹⁰⁹ *Farmers' Loan & Trust Co. v. Aberle*, 18 Misc. Rep. 257, 41 N. Y. Supp. 638.

¹¹⁰ *First Baptist Church v. Brooklyn Fire Ins. Co.*, 18 Barb. (N. Y.) 69; *Cotton States Life Ins. Co. v. Edwards*, 74 Ga. 220; *Muhleman v. National Ins. Co.*, 6 W. Va. 508; ante, note 77.

¹¹¹ *Home Insurance & Banking Co. v. Lewis*, 48 Tex. 622.

¹¹² *Knauer v. Globe Mut. Life Ins. Co.*, 16 Jones & S. (N. Y.) 454; *Abraham v. North German Ins. Co.*, 40 Fed. 717.

¹¹³ *Schreiber v. German-American Hail Ins. Co.*, 43 Minn. 367; *Bartlett v. Fireman's Fund Ins. Co.*, 77 Iowa, 155, 41 N. W. 601.

does not bind the company.¹¹⁴ Where the secretary and agent of the insurer with full knowledge of the premises, and without inquiring of the insured, put a value upon the premises insured the company cannot complain of misrepresentations as to the value.¹¹⁵ The officers of an insurance company in Indiana, not authorized to do business in Illinois, in receiving by mail an application from a person in Illinois for insurance in property there situated, issuing a policy thereon and sending it to Illinois, are chargeable with knowledge that they are participating in an act to be consummated by agents in Illinois forbidden by the laws of the latter state. Their knowledge is that of the company.¹¹⁶ The requirements of a policy as to proofs of loss may be waived by a letter written by the secretary at the office of the company, as a reply of the company to a notice of loss, notwithstanding a provision of the policy that no officer, agent or representative can waive any condition except by a writing indorsed on the policy. Such provisions do not apply to the company itself.¹¹⁷ The secretary of an insurance company may bind it by waiving the provisions of a policy, which gives it sixty days after proofs of loss have been made in which to pay.¹¹⁸ The acts of the president and secretary performed in the office of the company within the scope of their apparent power, whether they are written or verbal, whether they make a contract, waive a forfeiture or give consent, bind the company.¹¹⁹ The

¹¹⁴ Supreme Council of A. L. H. v. Green, 71 Md. 263, 17 Am. St. Rep. 527.

¹¹⁵ Redford v. Mutual Fire Ins. Co., 38 Up. Can. Q. B. 538.

¹¹⁶ Indiana Millers' Mut. Fire Ins. Co. v. People, 65 Ill. App. 355.

¹¹⁷ Powers v. New England Fire Ins. Co., 68 Vt. 390.

¹¹⁸ Farmers' Mut. Fire Ins. Co. v. Ensminger, 12 Wkly. Notes Cas. (Pa.) 9; Georgia Home Ins. Co. v. Jacobs, 56 Tex. 366.

¹¹⁹ Hartford Life & Annuity Ins. Co. v. Eastman, 54 Neb. 90, 74 N. W. 394; Dilleber v. Knickerbocker Life Ins. Co., 76 N. Y. 567;

financial collector of a local order of a mutual benefit society may extend the time in which members may pay their assessments, especially where his action is supported by a custom of doing so without objection.¹²⁰ A mutual company is bound by the action of its secretary in giving notice to a policy-holder.¹²¹

SUBORDINATE LODGES.

§ 89. Subordinate lodges are usually agents of their grand lodge.

In a mutual benefit life insurance company, the fact of membership carries with it the obligations derived from the rules of the society as well as the obligations imposed by the general laws of insurance. A member is presumed to know and is bound by such rules and laws. Subordinate lodges cannot by the mere assumption of authority invest themselves with powers which they do not possess; nor will either an applicant for membership, or a member, be heard to assert in such subordinate lodges power or authority especially reserved in the constitution or by-laws to a superior lodge, except in cases where custom or usage has established the right of the subordinate lodge to exercise such power and authority in the place of or on behalf of the superior body. The mere statement in the constitution or by-laws of a mutual organization composed of subordinate lodges and a grand lodge that the former are the agents of their members, and not the agents of the latter body, will not prevail over the legal effect of the actual status of the bodies toward each other as established by their general business transactions and rela-

First Baptist Church v. Brooklyn Fire Ins. Co., 19 N. Y. 305; Marcus v. St. Louis Mut. Life Ins. Co., 68 N. Y. 625.

¹²⁰ Whiteside v. Supreme Conclave I. O. H., 82 Fed. 275.

¹²¹ Olmstead v. Farmers' Mutual Fire Ins. Co., 50 Mich. 200.

tions.¹²² A mutual benefit organization whose by-laws provide that all applications for membership approved by the local lodge and its medical examiner shall be forwarded to the grand officers of the order for approval, and that the order shall not be bound until a certificate be issued and signed by the grand president and grand secretary, is not liable upon the death of a person to whom such certificate had not issued, although he had been initiated into the order and paid the required dues and assessments, and the local lodge had failed to promptly forward his application;¹²³ but otherwise if the certificate had been delivered to the subordinate lodge which neglected to deliver it to the member.¹²⁴ A certificate of insurance in a mutual order will not be forfeited for a cause known to the subordinate lodge to which a member belonged, where such subordinate lodge thereafter, with full knowledge, continued to treat the insurance as in full force, receiving the member's dues and paying the money over to the supreme lodge.¹²⁵ The concealment by the officers of a subordinate lodge of the falsity of the answers of an applicant

¹²² *Lorscher v. Supreme Lodge, K. of H.*, 72 Mich. 316, 2 L. R. A. 206; *Holland v. Taylor*, 111 Ind. 122; *Protection Life Ins. Co. v. Foote*, 79 Ill. 361; *Young v. Grand Council A. O. A.*, 63 Minn. 506; *Austerlitz v. Order of Chosen Friends*, 14 Nat. Corp. Rev. 630 (1897); *Whiteside v. Supreme Conclave I. O. H.*, 82 Fed. 275; *Clark v. Mutual Reserve Fund Life Ass'n*, 14 App. (D. C.) 154, 43 L. R. A. 390; *Sovereign Camp, W. of W., v. Rothschild*, 15 Tex. Civ. App. 463, 40 S. W. 553.

¹²³ *Misselhorn v. Mutual Reserve Fund Life Ass'n*, 30 Fed. 545; *Kohen v. Mutual Reserve Fund Life Ass'n*, 28 Fed. 705; *Kendall v. Pacific Mut. Life Ins. Co.*, 10 U. S. App. 256, 51 Fed. 689; *Mutual Life Ins. Co. v. Young's Adm'r*, 23 Wall. (U. S.) 85, 23 L. Ed. 152; *Elder v. Grand Lodge A. O. U. W. (Minn.)*, 82 N. W. 987; *Home Forum Ben. Order v. Jones*, 5 Okla. 598, 50 Pac. 165.

¹²⁴ *Lorscher v. Supreme Lodge K. of H.*, 72 Mich. 316, 2 L. R. A. 206.

¹²⁵ *High Court I. O. F. v. Schweitzer*, 171 Ill. 325, 49 N. E. 506.

for membership, cannot be charged to the applicant unless he requested the same.¹²⁶ The failure of the secretary of a local subordinate branch or section to transmit to the general board of control, within the time specified by the general law of an order, moneys paid to him in due time by a member, will not be ground for forfeiture of the policy of such member, since the secretary's negligence is not chargeable to the member, but is that of an agent of the order, notwithstanding a provision in the general laws of the order to the effect that he is to be regarded as an agent of the member, and not of the order, where the general laws also require the member to pay dues to such secretary only, and provide that the secretary shall transmit immediately after the 10th of each month all moneys collected by him, and that the local branch shall be responsible to the board of control for all such moneys collected by the secretary.¹²⁷

SPECIAL OR LOCAL AGENTS.

§ 90. Special or local agents of insurance companies have only limited powers within limited territory, except when particular power is granted to them to act in certain matters.

The terms "local" and "special" agents are often used interchangeably in speaking of the agents, other than general, of an insurance company. Properly speaking, a special agent is one appointed for a particular purpose, and

¹²⁶ *Knights of Pythias of the World v. Bridges*, 15 Tex. Civ. App. 196, 39 S. W. 333.

¹²⁷ *Supreme Lodge K. P. v. Withers*, 177 U. S. 260, 20 Sup. Ct. 612. But see *Nassauer v. Susquehanna M. F. Ins. Co.*, 109 Pa. St. 509; *Eilenberger v. Protective M. F. Ins. Co.*, 89 Pa. St. 464; *Lycoming Fire Ins. Co. v. Ward*, 90 Ill. 545; *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566; *North B. & M. Ins. Co. v. Crutchfield*, 108 Ind. 518; *Whiteside v. Supreme Conclave I. O. H.*, 82 Fed. 275; *Campbell v. Supreme Lodge K. P. of W.*, 168 Mass. 397, 47 N. E. 109.

a local agent is one of limited powers within a given and confined geographical area. To this class belong solicitors, brokers, medical examiners, agents to accept service of process, adjusters, appraisers, sub-agents and officers of insurance companies, except in cases where general or specific authority is granted by the charter, by-laws, conditions of policy, statutes, or necessities of the case. The acts, knowledge and representations of such agents within the scope of their authority bind their principal. The term "local" agent conveys no other meaning than that of an agent at a particular place or locality, but whether such agent has general or limited powers is not determined by simply calling him a local agent. The agents of insurance companies are scattered through the states in thousands. There are not only local agents appointed in every city and village, but also so-called general agents, who have charge of a large territory, and whose powers are usually much greater than those of a local agent. The actual powers of both classes of agents may be different from their apparent powers. It is essential to remember that so long as the agent acts within the apparent scope of his authority, the principal is bound by his acts, though they may be in excess of or violative of his authority.¹²⁸

A special agency properly exists where there is a delegation of authority to do a single act or particular acts; in contradistinction to a general agency, where there is a delegation of power to do all the acts connected with a particular trade, business or employment. The authority of the agent must be determined by the nature of the business and the apparent

¹²⁸ *Southern Life Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 607; *Bohen v. Williamsburgh City Ins. Co.*, 35 N. Y. 131; *Markey v. Mutual Ben. Life Ins. Co.*, 103 Mass. 78; *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117; *Eclectic Life Ins. Co. v. Fahrenkrug*, 68 Ill. 463; *Warner v. Peoria M. & F. Ins. Co.*, 14 Wis. 345.

scope of his employment therein. It cannot be narrowed by private or undisclosed instructions unless there is something in the nature of the business or the circumstances of the case to indicate that the agent is acting under special instructions or limited powers.¹²⁹

The ordinary and usual powers of local agents are to solicit insurance, fix rates, issue policies, and collect premiums. They may, in many cases, bind the principal by their acts in issuing policies with knowledge of facts violating the conditions of the policy, by giving credit for premium, and by other acts generally done by them in the usual course of business. But whatever incidental powers local or special agents authorized to accept applications for insurance, fix premiums, and issue policies, may have in connexion with the issuance and conditions of a policy, or while the property insured is in existence, cease when the subject of the risk is destroyed; and, when a claim of loss is asserted, the proceedings to establish and enforce such claim are not impliedly within the scope of such an agency.¹³⁰ Where an agent's authority expressly excluded the power to insure manufactories, and other special hazards, the mere circumstance that he had acted as local agent of the company was not equivalent to a declaration by it of authority in him to insure every kind of property and to exercise unlimited power. The proper inference would be that he had such powers only as were conferred by his commission, and could only insure in the mode required by the company's charter, in the absence of a custom or course of dealing to the contrary.¹³¹ If the powers of an agent of a mutual company are limited to taking insurance, receiving

¹²⁹ Bliss, *Life Ins.* §§ 277, 281 et seq.; cases *supra*.

¹³⁰ *Ermentrout v. Girard F. & M. Ins. Co.*, 63 Minn. 307, 30 L. R. A. 246.

¹³¹ *Reynolds v. Continental Ins. Co.*, 36 Mich. 131.

fees for the same, and receipting therefor, the fact that the policy was obtained by him, raises no legal presumption that he was authorized to receive assessments subsequently made.¹³² And one employed as a clerk or agent to solicit insurance and renewals of policies, and without any authority, except such as might arise from the course and nature of his employment, is not authorized to waive the payment of a premium on a contract for a renewal.¹³³

BROKERS AND SOLICITORS.

§ 91. Whether an insurance broker or an insurance solicitor is the agent of the insurer or of the insured must be determined from the facts and circumstances of each case. This rule is subject to the statutory regulations before mentioned.

The business of a broker is to serve as a connecting link between the party who is to be insured and the party who is to do the insuring,—to bring about the meeting of their minds which is necessary to the consummation of the contract. In the discharge of his business he is the representative of both parties to a certain extent.

The relation of a broker or a solicitor to insurer and insured, and whether he is the agent of the one party or the other in a given case, must depend on the facts and the circumstances of that case. The broker or the solicitor may be the agent of either party to the contract, or he may be the agent of each party for certain purposes. Thus he may be the agent of the insured in making the application and representations as to the property, and the agent of the insurer to deliver the policy and collect the premium. In any case he represents his principal within the scope of his authority and binds his principal by his acts, knowledge and representations within the scope of such authority. A solicitor is one who solicits in-

¹³² Crawford County Mut. Ins. Co. v. Cochran, 88 Pa. St. 230.

¹³³ Hambleton v. Home Ins. Co., 6 Biss. 91, Fed. Cas. No. 5,972.

surance either with or without precedent authority from an insurer. A broker is one who procures insurance, and negotiates between the insurer and the insured. In the absence of previous authority to represent an insurer, solicitors and brokers are ordinarily agents of the insurer for the purpose only of collecting the premium and delivering the policy. In other respects they are agents of the insured;¹³⁴ and their powers as agents of the insurer end when the policy is delivered.¹³⁵ One soliciting insurance and taking the application, will, in the absence of notice to the contrary, be held the agent of the company which accepts the application, issues the policy, and retains the premium. And the issuance of the policy under such circumstances estops the insurer to deny his agency.¹³⁶ But the solicitor may properly be held the agent of the applicant for the purpose of holding a premium note in escrow until the maker satisfies himself as to the conditions of the contract.¹³⁷ Domat thus defines his functions: "The engagement of a broker is like to that of a

¹³⁴ *Arff v. Star Fire Ins. Co.*, 125 N. Y. 57; *Union Ins. Co. v. Chipp*, 93 Ill. 96; *East Texas Fire Ins. Co. v. Brown*, 82 Tex. 631; *Security Ins. Co. v. Mette*, 27 Ill. App. 324; *Allen v. German American Ins. Co.*, 123 N. Y. 6; 2 Am. & Eng. Enc. Law (1st Ed.), 595; *Gude v. Exchange Fire Ins. Co.*, 53 Minn. 220. In *Bernheimer v. City of Leadville*, 14 Colo. 518, 24 Pac. 332, is found a discussion as to who are brokers, and what insurance agents come within the terms of an ordinance providing for the payment of license fees by insurance brokers. See, also, *Fromherz v. Yankton Fire Ins. Co.*, 7 S. D. 187, 63 N. W. 784; *Wilber v. Williamsburg City Fire Ins. Co.*, 122 N. Y. 439; *Wood v. Firemen's Fire Ins. Co.*, 126 Mass. 316; *Newark Fire Ins. Co. v. Sammons*, 110 Ill. 166.

¹³⁵ *Linder v. Fidelity & Casualty Co.*, 52 Minn. 304; *Goldin v. Northern Assur. Co.*, 46 Minn. 471.

¹³⁶ *London & Lancashire Fire Ins. Co. v. Gerteson (Ky.)*, 51 S. W. 617.

¹³⁷ *Mehlin v. Mutual Reserve Fund Life Ass'n (Ind. T.)*, 51 S. W. 1063.

proxy, a factor, or other agent, but with this difference, that the broker being employed by persons, who have opposite interests to manage, he is, as it were, agent both for the one and the other, to negotiate the commerce and affair in which he concerns himself. Thus his engagement is two-fold, and consists in being faithful to all the parties in the execution of what everyone of them entrusts him with; and his power is not to treat, but to explain the intentions of both parties, and to negotiate in such a manner as to put those who employ him in a condition to treat together personally."¹³⁸ Story says this statement of the functions of a broker is "a full and exact description according to the sense of our law."¹³⁹

Brokers — Agents of Insurer — Illustrations.

If a broker acts on behalf of an agent of an insurance company and solicits insurance from parties, he is the agent of the company and his knowledge is imputed to it. But if the assured employs the broker to place the insurance for him, the broker is the agent of the assured and not of the insurance company.¹⁴⁰ In an Indiana case, an application for a line of insurance was made to an insurance broker in Chicago. He in turn applied to a firm of insurance brokers also in Chicago to place a portion of the insurance, no particular company being designated. This firm placed the insurance in part, and then forwarded to the agent of the defendant at Indianapolis a copy of the description of the risk they had received with a blank form of application for insurance, without mentioning any par-

¹³⁸ Domat, Civil Law (Strahan's Translation), bk. 1, tit. 17, art. 1.

¹³⁹ Story, Agency (9th Ed.), p. 31, note 3; Hooper v. People, 155 U. S. 648, 15 Sup. Ct. 207; How v. Union Mut. Life Ins. Co., 80 N. Y. 32; Monitor Mut. Ins. Co. v. Young, 111 Mass. 537; Hartford Fire Ins. Co. v. Reynolds, 36 Mich. 502.

¹⁴⁰ Mohr & Mohr Distilling Co. v. Ohio Ins. Co., 13 Fed. 74.

ticular company. Defendant through said agent at Indianapolis, who was secretary of the company, wrote up the policy and forwarded it to the firm of insurance brokers who delivered it to the brokers from whom they received the application and he delivered it to the assured. The firm of insurance brokers in this instance, as on former occasions, with the knowledge and consent of defendant retained a portion of the premium for their services and remitted the balance to defendant. The court held the brokers were agents of defendant to the extent that it was bound by their knowledge of the premises insured.¹⁴¹ In another case the plaintiff contracted for insurance with one who was not an agent of defendant nor of its resident agents. Such person received from plaintiff the premium, which was transmitted, directly or indirectly, by him to the company, and a policy was returned through him, and by him delivered to plaintiff, and the court held that whether defendant, its resident agents or plaintiff, regarded such person as the agent of the insurer or not, he was such in the eye of the law, notwithstanding the policy provided that "any party, other than the assured, procuring the insurance, either at the office of the company or its agents, shall be considered the agent of the insured and not of this company."¹⁴² Where in pursuance of a circular issued by an insurance company offering commissions for business procured, a broker applies for insurance on property of another to the general agent of the company, receives the policy and is charged with the premium, such broker is agent of the company in securing the insurance, notwithstanding a provision of the policy that if it be pro-

¹⁴¹ *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177.

¹⁴² *Bassell v. American Fire Ins. Co.*, 2 Hughes, 531, Fed. Cas. No. 1,094.

cured by a broker he shall be considered the agent of the insured.¹⁴³

Brokers — Agents of Insured — Illustrations.

In a recent New York case, Peckham, J., says: "What is understood under the designation of an insurance broker is, one who acts as a middleman between the insured and the company, and who solicits insurance from the public under no employment from any special company; but having secured an order, he either places the insurance with the company selected by the insurer, or in the absence of any selection by him, then with the company selected by such broker. Ordinarily the relation between the insured and the broker is that between the principal and his agent, and according to Arnould on Insurance, (2d Ed. vol. 1, c. 5, p. 108), 'the business of a policy broker would seem to be limited to receiving instructions from his principals as to the nature of the risk and the rate of premium at which he wishes to insure, communicating these facts to the underwriters, effecting the policy with them on the best possible terms for his employer, paying them the premium and receiving from them whatever may be due in case of loss.'"¹⁴⁴ A broker or solicitor, if not in any way previously authorized by or connected with the insurer, is the agent of the insured in procuring the policy and in any representations he may make concerning the property. He is only the agent of the insurer to deliver the policy and collect the premium.¹⁴⁵ If the insured first places in the hands of an insurance broker, who

¹⁴³ *Gayssville Mfg. Co. v. Phœnix Mut. Fire Ins. Co.*, 67 N. H. 457, 36 Atl. 367.

¹⁴⁴ *Arff v. Star Fire Ins. Co.*, 125 N. Y. 57, 21 Am. St. Rep. 721.

¹⁴⁵ *Gude v. Exchange Fire Ins. Co.*, 53 Minn. 220; *Fromherz v. Yankton Fire Ins. Co.*, 7 S. D. 187, 63 N. W. 784; *Rahr v. Manchester Fire Assur. Co.*, 93 Wis. 355, 67 N. W. 725; *Wilber v. Williams-*

is not the regular agent of a company, a written application for insurance, he invests him with an indicium of agency and is bound by statements he may make in the application, and cannot deny that he was his agent.¹⁴⁶ Where the insured filled out an application and gave it to an insurance agent with instructions to procure insurance in any good company, and such agent procured insurance on such application in a company other than his own, he was held to be the agent of the insured.¹⁴⁷

A broker is not the agent of the insurer in procuring insurance where, having no authority from or blanks of the insurer, he requests it to write a certain policy, which it does, and for his services allows him a commission on the cash premium received.¹⁴⁸ A broker in such case and independently of a statute on the subject, is the agent of the insured, and his acts and representations within his authority as such agent are binding upon the insured though for some purposes he may be the agent for the insurer. In Wisconsin he is the agent of one who employs him to procure insurance in respect to everything which does not conflict with his agency for the insurer as declared by Rev. St. Wis. § 1977, providing that whoever solicits insurance on behalf of an insurance corporation or property owner shall be held an agent of such corpora-

burgh City Fire Ins. Co., 122 N. Y. 439. See, also, *John R. Davis Lumber Co. v. Hartford Fire Ins. Co.*, 95 Wis. 226, 70 N. W. 86.

¹⁴⁶ *Fame Ins. Co. v. Thomas*, 10 Ill. App. 545; *Kings County Fire Ins. Co. v. Swigert*, 11 Ill. App. 590.

¹⁴⁷ *Fame Ins. Co. v. Thomas*, 10 Ill. App. 545; *Seamans v. Knapp-Stout & Co. Company*, 89 Wis. 171; *How v. Union Mut. Life Ins. Co.*, 80 N. Y. 32.

¹⁴⁸ *Seamans v. Knapp-Stout & Co. Company*, 89 Wis. 171, 27 L. R. A. 362; *Gude v. Exchange Fire Ins. Co.*, 53 Minn. 220; *Freedman v. Providence Wash. Ins. Co.*, 182 Pa. St. 64, 37 Atl. 909; *Allen v. German American Ins. Co.*, 123 N. Y. 6; *Ben Franklin Ins. Co. v. Weary*, 4 Ill. App. 74.

tion to all intents and purposes, and he may bind the insured in matters pertaining to the procurement of the policy.¹⁴⁹ The knowledge of a broker or mere soliciting agent is not chargeable to the insurer.¹⁵⁰ One who at the request of the insured for other insurance in lieu of a canceled policy applied to another firm of insurance brokers and received from them a policy which he delivered to the insured is not the agent of the company issuing the last policy.¹⁵¹ A broker employed by insured to procure a policy has no implied authority to collect the premium for the company after the delivery of the policy, although the company intrusted the policy to him for delivery.¹⁵² An agent or broker of a fire insurance company having power and authority to deliver a policy issued by it and to receive the premium thereon, has no authority nor is it within the apparent scope of his authority to bind the company by subsequently altering the contract of insurance by the insertion of a clause binding the company to pay the loss to one other than the insured, although such policy was written for the assured on the application of the agent.¹⁵³

Solicitors.

One who on his own behalf solicits insurance, submits applications to a company, and, if accepted, receives the pol-

¹⁴⁹ *John R. Davis Lumber Co. v. Hartford Fire Ins. Co.*, 95 Wis. 226, 70 N. W. 84; *American Fire Ins. Co. v. Brooks*, 83 Md. 22, 34 Atl. 373; *Standard Oil Co. v. Triumph Ins. Co.*, 3 Hun (N. Y.), 591; *Lange v. Lycoming Fire Ins. Co.*, 3 Mo. App. 591; *Blackburn, Low & Co. v. Vigers*, 17 Q. B. Div. 553.

¹⁵⁰ *Fromherz v. Yankton Fire Ins. Co.*, 7 S. D. 187, 63 N. W. 784; *Gude v. Exchange Fire Ins. Co.*, 53 Minn. 220, and cases in preceding notes. In an extreme case, Illinois held the contrary. *Union Ins. Co. v. Chipp*, 93 Ill. 96.

¹⁵¹ *State v. Johnson*, 43 Minn. 350.

¹⁵² *Citizens' Fire Ins. Co. v. Swartz*, 21 Misc. Rep. 671, 47 N. Y. Supp. 1107.

¹⁵³ *Duluth Nat. Bank v. Knoxville Fire Ins. Co.*, 85 Tenn. 76.

icy, and on its delivery collects the premium which he pays over to the company, receiving a commission thereon, without any antecedent authority to act for such insurer, has not, in the absence of statutory provision or some custom or mode of transacting business on the part of the insurer which would warrant the insured in believing him to be invested with greater powers, authority to bind the company by his oral contract to insure, nor to consent to the procurement of additional insurance, nor to waive any of the terms or conditions of the policy, nor does his knowledge bind the company. Such an agent is the representative of the company only for the purposes of delivering the policy and collecting the premium, and when that is done his agency ceases.¹⁵⁴ But when an insurance company appoints a solicitor its agent to solicit, take and transmit to it applications for insurance to be by it accepted or rejected the rule is reversed, and the solicitor must be deemed the agent of the company in all that he does in preparing the application and in any representation he may make as to the character or effect of the statements therein contained; and this rule is not changed by a stipulation in the policy subsequently issued that the acts of such agent in making out the application shall be deemed the acts of the insured.¹⁵⁵

¹⁵⁴ *Gude v. Exchange Fire Ins. Co.*, 53 Minn. 220; *Goldin v. Northern Assur. Co.*, 46 Minn. 471; *People v. People's Ins. Exchange*, 126 Ill. 466, 2 L. R. A. 340; *Wilkins v. State Ins. Co.*, 43 Minn. 177; *Northrup v. Piza*, 43 App. Div. 284, 60 N. Y. Supp. 363.

¹⁵⁵ *Deitz v. Providence Wash. Ins. Co.*, 31 W. Va. 851, 33 W. Va. 526; *Phoenix Ins. Co. v. Stark*, 120 Ind. 444; *Rogers v. Phenix Ins. Co.*, 121 Ind. 570; *Niagara Ins. Co. v. Lee*, 73 Tex. 641; *Crouse v. Hartford Fire Ins. Co.*, 79 Mich. 249; *Southern Life Ins. Co. v. McCain*, 96 U. S. 84; *Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 553, 5 L. R. A. 646; *Hoose v. Prescott Ins. Co.*, 84 Mich. 309, 11 L. R. A. 340; *Whitney v. National Masonic Acc. Ass'n*, 57 Minn. 472.

Powers of Solicitor — Illustrations.

An insured is chargeable with knowledge of the limitations upon the powers of a soliciting agent, and that he cannot bind the company contrary to the provisions of the policy by stating that it will make no difference where the insured property is situated;¹⁵⁶ and with knowledge that he cannot consent to an assignment of the policy.¹⁵⁷ He has no authority to bind the company by declarations as to the validity of the certificate or as to the rights and liabilities of the company, when not made in the discharge of his duty as agent in the transaction in question;¹⁵⁸ nor accept the surrender of a policy.¹⁵⁹ He cannot bind his principal by a contract of insurance unless there is proof of his authority;¹⁶⁰ has no power to construe an application for insurance and a premium note, nor to declare their legal effect;¹⁶¹ cannot waive a forfeiture of any of the conditions of the policy;¹⁶² cannot consent to additional insurance.^{162a} An agent authorized to solicit and receive applications for insurance has no power to accept an application and bind his principal by a statement made to the applicant that the risk attached at a certain moment.¹⁶³ An agreement to procure a policy to be issued, does not create a present liability against the com-

¹⁵⁶ *Dryer v. Security Fire Ins. Co.*, 94 Iowa, 471, 62 N. W. 798.

¹⁵⁷ *Strickland v. Council Bluffs Ins. Co.*, 66 Iowa, 466, 23 N. W. 926.
But see *Fitchner v. Fidelity Mut. Fire Ass'n (Iowa)*, 68 N. W. 710.

¹⁵⁸ *Schoep v. Bankers' Alliance Ins. Co.*, 104 Iowa, 354, 73 N. W. 825.

¹⁵⁹ *Susquehanna Mut. Fire Ins. Co. v. Swank*, 102 Pa. St. 17.

¹⁶⁰ *Todd v. Piedmont & A. Life Ins. Co.*, 34 La. Ann. 63.

¹⁶¹ *Winchell v. Iowa State Ins. Co.*, 103 Iowa, 189, 72 N. W. 503.

¹⁶² *Hausen v. Citizens' Ins. Co.*, 66 Mo. App. 29; *Torrop v. Imperial Fire Ins. Co.*, 26 Can. Sup. Ct. 585.

^{162a} *Heath v. Springfield Fire Ins. Co.*, 58 N. H. 414.

¹⁶³ *Stockton v. Firemen's Ins. Co.*, 33 La. Ann. 577; *Summers v. Commercial Union Assur. Co.*, 6 Can. Sup. Ct. 19.

pany.¹⁶⁴ An underwriter is not bound by notice of a fact to its solicitor;¹⁶⁵ nor by notice after the policy has issued, to one who effects insurance under no employment by it, but for a commission paid by it to him for such risks as he obtains and it chooses to accept. In such case his agency ceases with the delivery of the policy.¹⁶⁶

STIPULATIONS IN POLICY REGULATING AGENCY.

§ 92. The actual status of an agent of the insurer, as to matters precedent to the issuance of the policy, is not affected by stipulations in the policy making him the agent of the insured.

The authorities are divided on this question, but the above rule is expressive of the preponderance of the law on the subject. And indeed, it seems most consonant with justice and reason, that an insurer should not be heard to deny that it is represented by those whom it hires and sends out as its agents, or that such agents have powers necessary to the transaction of its business. The true status of an agent and his legal relation to both insurer and insured can be better determined from a consideration of his business dealings and relations with both parties than from the terms of a policy, of the contents of which the insured had no information or knowledge until after its delivery.¹⁶⁷

After the courts had generally established this doctrine, e. g. that soliciting agents of insurance companies are agents of insurer and not of insured, many of the insurance companies, in order to obviate it, adopted the ingenious device

¹⁶⁴ *Farmers' & Merchants' Ins. Co. v. Graham*, 50 Neb. 818, 70 N. W. 386.

¹⁶⁵ *Tate v. Hyslop*, 15 Q. B. Div. 368.

¹⁶⁶ *Devens v. Mechanics' & Traders' Ins. Co.*, 83 N. Y. 168; *Heath v. Springfield Fire Ins. Co.*, 58 N. H. 414.

¹⁶⁷ *Ante*, notes 1-6.

of inserting a provision in the policy that the application, by whomsoever made, whether by the agent of the company or any other person, should be deemed the act of the insured and not of the insurer. But, as has been well remarked, "A device of words cannot be imposed upon a court in place of an actuality of facts." The real situation cannot be hidden in this manner. Such a clause is no part of a contract. It is an attempt to reverse the law of agency, and to declare that a party is not bound by his agent's acts. Whether one is an agent of another is a question of mixed law and fact, depending on the authority given expressly or impliedly. And when a contract is, in fact, made through the agent of a party, the acts of that agent in that respect are binding on his principal. It would be a stretch of legal principles to hold that a person dealing with an agent, apparently clothed with authority to act for his principal in the matter in hand, could be affected by notice, given after the negotiations were completed, that the party with whom he had dealt should be deemed transformed from the agent of one party into the agent of the other. To be efficacious, such notice should be given before the negotiations are completed. The application precedes the policy, and the insured cannot be presumed to know that any such provision will be inserted in the latter. To hold that, by a stipulation unknown to the insured at the time he made the application, and when he relied upon the fact that the agent was acting for the company, he could be held responsible for the mistakes of such agent, would be to impose burdens upon the insured which he never anticipated. Hence if the agent was the agent of the company in the matter of making out and receiving the application, he cannot be converted into an agent of the insured by merely calling him such in the policy subsequently issued; nor is there any difference between stock and mutual insurance companies in this

respect. It was formerly held in New York¹⁶⁸ that where the insured had contracted that the person who procured the insurance should be deemed his agent, he must be bound by the agreement; but in subsequent cases¹⁶⁹ this doctrine was

¹⁶⁸ Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451; Alexander v. Germania Fire Ins. Co., 66 N. Y. 464.

¹⁶⁹ Whited v. Germania Fire Ins. Co., 76 N. Y. 415, 32 Am. Rep. 330; Sprague v. Holland Purchase Ins. Co., 69 N. Y. 128. In *Patridge v. Commercial Fire Ins. Co.*, 17 Hun (N. Y.), 95, it was said of the agency clause: "This is a provision which deserves the condemnation of courts, whenever it is relied upon to work out a fraud, as it is in this case." In *Continental Ins. Co. v. Pearce*, 39 Kan. 396, 18 Pac. 291, it is said: "This is but a form of words to attempt to create on paper an agency, which in fact never existed. * * * The real fact, as it existed, cannot be hidden in this manner; much less can it be destroyed, and something that did not in reality exist be placed in its stead. The substance is superior to the mere drapery of words with which one party wishes to bring into existence and clothe an unreal authority." In Indiana it is also held that a recital in the policy that the broker obtaining an insurance is the agent of the insured is not conclusive upon that subject. *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566. In *North British & M. Ins. Co. v. Crutchfield*, 108 Ind. 518, 9 N. E. 458, the agency clause was held to be absolutely void as applied to a local agent, upon whose counter signature the validity of the policy, by its terms, was made to depend. In *Boetcher v. Hawkeye Ins. Co.*, 47 Iowa, 253, it was held that, if the assured had the right to believe the soliciting agent was the agent of the company, the insertion of a clause in the policy providing that he was the agent of the assured constituted a fraud upon the latter, of which the company could not take advantage. *Nassauer v. Susquehanna M. & F. Ins. Co.*, 109 Pa. St. 509; *Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 553, 5 L. R. A. 646; *Lycoming Fire Ins. Co. v. Ward*, 90 Ill. 545; *Kausal v. Minnesota Farmers' Mut. Fire Ass'n*, 31 Minn. 17; *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521; *Schunck v. Gegenseitiger Wittwen & Waisen Fond*, 44 Wis. 369; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, 3 Sup. Ct. 207; *Whiteside v. Supreme Conclave I. O. H.*, 82 Fed. 275; *Supreme Lodge K. P. v. Withers*, 177 U. S. 260, 20 Sup. Ct. 615; *McElroy v. British American Assur. Co. (C. C. A.)*, 94 Fed. 990; *Arff v. Star Fire Ins. Co.*, 125 N. Y. 57. See, contra, *Campbell v. Supreme Lodge K. P. of the World*, 168 Mass. 397, 47 N. E. 109; *Wilber v. Williamsburgh City Fire Ins. Co.*, 122 N. Y. 439.

held to be limited to such acts as the agent performed in the obtaining of the policy and not applicable to renewals.

But while such stipulations are ineffectual to change the status of one who is in fact the agent of the insurer so as to make him instead the agent of the insured, they are valid and effective as controlling the status of persons operating on their own account or on behalf of the assured, and not representing the insurer in procuring the insurance.¹⁷⁰

In a Maryland case, the agent of a company which had issued a policy on the property was applied to for a renewal thereof. He declined to accept the risk entire, but issued a policy for a portion of the amount desired and procured a policy in defendant company for a similar amount. Both policies came to insured through one not an agent of defendant to whom payment of the premium was made. The policy issued by it provided that "any person, other than the assured, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in the policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance." The court held that these facts formed a proper basis for the application of the provision quoted, and defendant was not bound by the acts of the agents of the other company.¹⁷¹

¹⁷⁰ *Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 553, 5 L. R. A. 646; *Davis v. Aetna Mut. Fire Ins. Co.*, 67 N. H. 335, 27 Ins. Law J. 549, 39 Atl. 902; *Estes v. Aetna Mut. Fire Ins. Co.*, 67 N. H. 462, 33 Atl. 515; *Sowden v. Standard Ins. Co.*, 44 Upper Can. Q. B. 95, 5 Ont. App. 290; *Fowler v. Preferred Acc. Ins. Co.*, 100 Ga. 330, 28 S. E. 398; *Globe Mut. Life Ins. Co. v. Wolff*, 95 U. S. 329; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519.

¹⁷¹ *Atlantic Ins. Co. v. Carlin*, 58 Md. 336; *Wilber v. Williamsburgh City Fire Ins. Co.*, 122 N. Y. 439.

AGENTS OF MUTUAL COMPANIES.

§ 93. There is no difference in this regard between the powers of agents of stock and agents of mutual companies prior to the delivery and acceptance of the policy.

It is often contended that the difference in the character of "stock" and "mutual" insurance companies makes a difference in the relative duties of the applicant and the company, and in the authority of the agents employed; that in the case of a mutual company, the application is in effect not merely for insurance, but for admission to membership,—the applicant himself becoming a member of the company upon the issuance of the policy. This distinction is usually based upon the ground that the stipulations held binding upon the insured are contained in the charter or by-laws of the company, and that a person applying for membership is conclusively bound by the terms of such charter and by-laws. It is true that in the case of a mutual company the insured becomes in theory a member of the company upon the issuance of the policy. But in applying and contracting for insurance, the applicant and the company are as much two distinct persons as in the case of a stock company, and there is no reason for holding the agent who takes the application any less the agent of the insurer in the one case than in the other. The membership does not begin until the policy is issued. As to all previous negotiations the agent acts only for the company.^{171a} But after

^{171a} Russell v. Detroit Mut. Fire Ins. Co., 80 Mich. 407, 45 N. W. 356; Grace v. American Cent. Ins. Co., 109 U. S. 278, 3 Sup. Ct. 207; Harle v. Council Bluffs Ins. Co., 71 Iowa, 401, 32 N. W. 396; Kister v. Lebanon Mut. Ins. Co., 128 Pa. St. 553; Boetcher v. Hawkeye Ins. Co., 47 Iowa, 253; Planters' Ins. Co. v. Myers, 55 Miss. 479; Deitz v. Providence Wash. Ins. Co., 31 W. Va. 851, 33 W. Va. 526; Newark Fire Ins. Co. v. Sammons, 110 Ill. 166; Coles v. Jefferson Ins. Co., 41 W. Va. 261, 23 S. E. 732; American Fire Ins. Co. v. Brooks, 83 Md. 22, 34 Atl. 373; Sullivan v. Phenix Ins. Co., 34 Kan.

an applicant has accepted a policy in a mutual company and has thereby become a member he is bound by all the stipulations in the policy and all the conditions and provisions of the charter and by-laws. He is chargeable with notice and knowledge of, and is conclusively presumed to know, the extent and limitations of the agent's power and authority as fixed by the charter or by-laws.¹⁷²

STIPULATIONS IN APPLICATION REGULATING AGENCY.

§ 94. An applicant for a policy of insurance is bound by a stipulation in his written application that a third person participating in the negotiations shall, for the purposes of procuring the policy, be deemed his agent, and not the agent of the insurer.

Where an insurance policy is based upon a written application such application is the initial step towards the consummation of the contract. It is in itself an agreement of the parties, wherein they are privileged, unless prevented by statute, to make such stipulations as they choose concerning the conduct of subsequent negotiations and proceedings; and no principle of law is violated by enabling the parties to say who are the agents of each party, and what shall be the status of agents.

170; *Kausal v. Minnesota Farmers' Mut. Fire Ins. Ass'n*, 31 Minn. 17; *Joyce, Ins.* § 393; *May, Ins.* § 139 et seq.

¹⁷² *Morawetz, Priv. Corp.* § 501; *Bacon, Ben. Soc.* 426; *Niblack, Mut. Ben. Soc.* §§ 12, 166; *Miller v. Hillsborough Mut. Fire Assur. Ass'n*, 42 N. J. Eq. 461; *Leonard v. American Ins. Co.*, 97 Ind. 299; *Brewer v. Chelsea Mut. Fire Ins. Co.*, 14 Gray (Mass.), 209; *Merserau v. Phoenix Mut. Life Ins. Co.*, 66 N. Y. 274; *Sovereign Camp W. of W. v. Rothschild*, 15 Tex. Civ. App. 463, 40 S. W. 553; *Manufacturers' & Merchants' Mut. Ins. Co. v. Gent*, 13 Ill. App. 308; *Coles v. Iowa State Mut. Ins. Co.*, 18 Iowa, 425; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. St. 402; *Bauer v. Samson Lodge, K. P.*, 102 Ind. 262; *Fugure v. Mutual Soc. of St. Joseph*, 46 Vt. 362; *Fitzgerald v. Metropolitan Acc. Ass'n*, 106 Iowa, 457, 76 N. W. 809; ante, note 122, "Subordinate Lodges as Agents."

The reasoning in support of the rule laid down in the previous section, is based upon the theory that the insured has no knowledge of stipulations in the policy regulating agency until the contract is completed, and that such stipulations are not brought to his notice till the policy is delivered. But this reasoning has no relevancy in a discussion of the rights of the parties to stipulate for themselves in the application. It is competent for any party or corporation to employ an agent in the negotiation of a contract, whether of insurance or otherwise, and to amplify or limit the powers of such agent. And if an applicant signs a contract making a solicitor his agent in the matters then pending, he is held to have knowledge of its contents; and he will not be heard to say after his application has been accepted and acted on, that he did not know the contents of his proposal upon which the subsequent contract is based; he is estopped to assert such a claim in a suit wherein he relies upon and seeks to enforce such contract. It may well be argued in certain cases that fraud will justify the rescission of the contract where the applicant can bring himself within the rules of law entitling him to relief from a contract which he did not intend to make; but one cannot be heard to assert and disaffirm his contract in the same action. He must take it *cum onere* or reject it altogether. He cannot maintain his action on the policy, issued upon his proposal, and at the same time repudiate the terms of his proposal. A provision of an application that the person taking it and the medical examiner shall be and are the agents of the applicant and not the agents of the insurer in the preparation of the application and as to all statements and answers contained therein is binding upon the insured; and false statements and answers are chargeable to and imputed to the insured even though he answered the questions truthfully and the

false answers were inserted by the agent without the knowledge of the insured.¹⁷³

Limitations of Rule.

A provision in an application making a general agent of the insurer the agent of the insured cannot change the legal status of the agent.¹⁷⁴ The declarations made by a medical examiner in his letter to his insurance company, as to the habits of the applicant, are not binding upon the latter notwithstanding the fact that the application provides that the medical examiner is the agent of the applicant in filling up the same, and the applicant knew that under certain conditions a letter was to be written to the company by the medical examiner in relation to the application and the examination.¹⁷⁵ The stipulation in an application that "the application has been made, prepared, and written by the applicant, or by his own proper agent" does not make the agent of the insurer, who

¹⁷³ *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519; *Maier v. Fidelity Mut. Ins. Ass'n (C. C. A.)*, 78 Fed. 566; *Ward v. Metropolitan Life Ins. Co.*, 66 Conn. 227; *Ketcham v. American Mut. Acc. Ass'n*, 117 Mich. 521, 76 N. W. 5; *McCoy v. Metropolitan Life Ins. Co.*, 133 Mass. 82; *Flynn v. Equitable Life Assur. Soc.*, 67 N. Y. 500; *Lee v. Guardian Life Ins. Co.*, 2 Cent. Law J. 495; *Messelback v. Norman*, 122 N. Y. 578; *Globe Mut. Life Ins. Co. v. Wolff*, 95 U. S. 329; *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 240; *Hubbard v. Mutual Reserve Fund Life Ass'n*, 80 Fed. 681; *Bernard v. United Life Ins. Ass'n*, 14 App. Div. (N. Y.) 142, 43 N. Y. Supp. 527; *Chamberlain v. Prudential Ins. Co. (Wis.)*, 85 N. W. 128; *Wilber v. Williamsburgh City Fire Ins. Co.*, 122 N. Y. 439; *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 5; *Clevenger v. Mut. Life Ins. Co.*, 2 Dak. 114, 3 N. W. 313. See post, note 218; *Ebert v. Mutual Reserve Fund Life Ass'n*, 81 Minn. 116, 83 N. W. 507.

¹⁷⁴ *Coles v. Jefferson Ins. Co.*, 41 W. Va. 261, 25 Ins. Law J. 247, 23 S. E. 732.

¹⁷⁵ *Massachusetts Ben. Life Ass'n v. Robinson*, 104 Ga. 256, 7 Ins. Law J. (N. S.) 1003, 42 L. R. A. 261; *Endowment Rank, K. P., v. Cogbill*, 99 Tenn. 28, 26 Ins. Law J. 920, 41 S. W. 340.

solicits the insurance, the agent of the insured for the purpose of taking the application, so that the insured will be bound by the mistake or fraud of the agent in transcribing his answers to the questions in the application.¹⁷⁶

BEFORE ISSUANCE OF POLICY.

§ 95. An insurer is always bound by the acts, knowledge, fraud, mistake and representations of its agents while they act within the scope of their real or apparent authority.

The insurer is chargeable with the knowledge of its agent,

(a) Acquired by him in the line of his duty, or

(b) Had in mind by him during the discharge of his duty.

Notice to an insurance agent, at the time of receiving an application or issuing or renewing a policy, of facts material to the risk is notice to the insurer.

The great preponderance of decided cases hold that the agents of an insurance company authorized to procure applications for insurance and to forward them to the company for acceptance are the agents of the insurers, and not of the insured, in all that they say or do in procuring or preparing the applications. Public policy and good faith require that the persons clothed by the insurance companies with power to examine proposed risks, and fill out, receive, and approve applications for insurance, shall bind their principals by acts done and knowledge acquired by them in the execution of such power.¹⁷⁷

¹⁷⁶ *O'Farrell v. Metropolitan Life Ins. Co.*, 22 App. Div. 495, 48 N. Y. Supp. 199; rehearing denied in 48 N. Y. Supp. 695.

¹⁷⁷ *Home Fire Ins. Co. v. Gurney*, 56 Neb. 306, 76 N. W. 553; *Home Fire Ins. Co. v. Fallon*, 45 Neb. 554; *Kausal v. Minnesota Farmers' Mut. Fire Ins. Ass'n*, 31 Minn. 17, and cases cited; *Quinn v. Metropolitan Life Ins. Co.* 10 App. Div. 483, 41 N. Y. Supp. 1060; *Tooker v. Security Trust Co.*, 26 App. Div. 372, 49 N. Y. Supp. 814; *Metropolitan Acc. Ass'n v. Clifton*, 63 Ill. App. 197; *Coles v. Jefferson Ins. Co.*, 41 W. Va. 261, 23 S. E. 732; *Marston v. Kennebec Mut. Life Ins. Co.*, 89 Me. 266, 36 Atl. 389; *German Ins. Co. v. Gray*, 43 Kan. 497, 8 L. R. A. 70; *Equitable Life Ins. Co. v. Hazelwood*, 75 Tex. 338, 7

Acts of Agents.

If the agent of insurer assumes the responsibility of valuing the property he insures, and was not influenced by the representations or refusal of the insured to answer questions, the company is bound.¹⁷⁸ When the insured signs the application in blank and the agent of the insurer, without authority or direction from insured, fills out the blanks therein, the company cannot take advantage of any misstatements contained in it.¹⁷⁹ If the agent of insurer writes the answers concerning the title of insured to the property without making inquiries of him the question of waiver is for the jury, notwithstanding a provision in the policy declaring that it shall be void if the true state of the title is not disclosed.¹⁸⁰ An insurer cannot take advantage of the fact that its agent who took the application for the insured, signed the latter's name thereto with his authority;¹⁸¹ and after receiving a premium and issuing a policy therefor based on an application filled up by its authorized agent, is estopped to set up false answers therein, unless the applicant was aware at the time the answers were being written, or before signing the application, that they were written falsely to defraud the company.¹⁸²

L. R. A. 217; *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304. There is no difference in this particular between agents of stock and mutual companies; nor between regularly appointed and statutory agents. *Bourgeois v. Northwestern Nat. Ins. Co.*, 86 Wis. 609, 57 N. W. 348; *Boyle v. Northwestern Mut. Relief Ass'n*, 95 Wis. 312, 70 N. W. 351; *Continental Life Ins. Co. v. Chamberlain*, *supra*.

¹⁷⁸ *Perry v. Mechanics' Mut. Ins. Co.*, 11 Fed. 485.

¹⁷⁹ *Hingston v. Aetna Ins. Co.*, 42 Iowa, 46.

¹⁸⁰ *Dahlberg v. St. Louis Mut. F. & M. Ins. Co.*, 9 Mo. App. 584.

¹⁸¹ *Prudential Ins. Co. v. Cummins' Adm'r*, 19 Ky. Law Rep. 1770, 27 Ins. Law J. 637, 44 S. W. 431.

¹⁸² *Southern Ins. Co. v. Hastings*, 64 Ark. 255, 41 S. W. 1093.

What Knowledge of Agent Binds Insurer.

A principal is bound with notice of such facts as come to his agent's knowledge while acting within the scope of his agency, or had in mind by the agent while discharging his duty. Knowledge acquired by an agent in the taking or preparation of an application, or in and about the issuing of a policy in connection with the subject matter thereof, is imputed to the insurer. And the insurer is chargeable with the soliciting agent's knowledge concerning the falsity of statements made in the application.¹⁸³ And notice to an agent's clerk is notice to the agent and hence to the principal.¹⁸⁴ But a provision that the agent's knowledge of the falsity of any statement made by the assured shall not affect the company's right to declare the policy void on account of a breach of warranty is binding on the assured.¹⁸⁵ In order to avoid the effect of a condition against prior insurance, proof that the agent who took the application was put upon inquiry is insufficient. It must be shown that the agent actually knew of outstanding insurance. He cannot be held to have such knowledge where he mistakenly supposed the

¹⁸³ *German Ins. Co. v. Gray*, 43 Kan. 497, 8 L. R. A. 70; *Kauffman v. Robey*, 60 Tex. 308; *Massachusetts Life Ins. Co. v. Eshelman*, 39 Ohio St. 657; *Smith v. Niagara Fire Ins. Co.*, 60 Vt. 682, 1 L. R. A. 217; *McGurk v. Metropolitan Life Ins. Co.*, 56 Conn. 528, 1 L. R. A. 563; *Wade, Notice*, § 687; *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737; *Phenix Ins. Co. v. Searles*, 100 Ga. 97, 27 S. E. 779; *Richmond v. Niagara Fire Ins. Co.*, 79 N. Y. 230; *Mullin v. Vermont Mut. Fire Ins. Co.*, 58 Vt. 113; *Couch v. Rochester German Fire Ins. Co.*, 25 Hun (N. Y.), 469; *Forward v. Continental Ins. Co.*, 142 N. Y. 382, 25 L. R. A. 637.

¹⁸⁴ *Bennett v. Council Bluffs Ins. Co.*, 70 Iowa, 600, 31 N. W. 948.

¹⁸⁵ *Hutchison v. Hartford Life & Annuity Ins. Co. (Tex.)*, 39 S. W. 325; *Ebert v. Mutual Reserve Fund Life Ass'n*, 81 Minn. 116, 83 N. W. 507.

other insurance to have lapsed;¹⁸⁶ and the knowledge must be of matters mentioned in the policy and application.¹⁸⁷

A different rule obtains in South Carolina, where it is held that an insurer cannot claim a forfeiture of a policy for violation of its conditions, if the agent who issued the policy had information which, if pursued, would have led to actual knowledge of the existence of the facts on account of which the forfeiture was claimed, even though he did not have any actual knowledge at the time of issuing the policy.¹⁸⁸ Knowledge of a fact received by an agent at a time when he is not acting as such, if actually had in mind by the agent when he subsequently acts for his principal, will, as respects that transaction, be imputed to the principal;¹⁸⁹ but the agent's knowledge of matters affecting the risk acquired while attending to his own affairs will not be chargeable to his principal unless it was present in his mind when the policy was issued, or when, in the line of his duty to his principal, he did some act recognizing the validity of the policy after its issuance.¹⁹⁰ The insurer is not chargeable with notice of a chattel mortgage on the insured property though its agent who issued the policy had previously acquired knowledge of the mortgage in the capacity of notary public

¹⁸⁶ *Steele v. German Ins. Co.*, 93 Mich. 81, 18 L. R. A. 85.

¹⁸⁷ *Enos v. Sun Ins. Co.*, 67 Cal. 621; *Traders' Ins. Co. v. Cassell* (Ind. App.), 50 Cent. Law J. 248. In Mississippi it is held that notice to an agent whose authority is limited to soliciting, receiving, and submitting applications, and delivering policies and collecting premiums, that one who is about to insure a general stock of merchandise keeps gunpowder in his store, is not notice to the principal. *Liverpool & L. & G. Ins. Co. v. Van Os*, 63 Miss. 431.

¹⁸⁸ *Gandy v. Orient Ins. Co.*, 52 S. C. 224, 29 S. E. 655.

¹⁸⁹ *Wilson v. Minnesota Farmers' Mut. Fire Ins. Ass'n*, 36 Minn. 112.

¹⁹⁰ *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 39 L. R. A. 789.

and attorney for the insured.¹⁹¹ Knowledge of the condition of property acquired by an agent in connection with his duties as agent of another company, some days before the issuing of the policy in suit, does not create the presumption that he knew the previous condition still existed when he issued the latter policy, and that he intended to waive any provisions of the policy, when it further appears that the insured had previously agreed to put the property into the condition required by the policy;¹⁹² but the mere fact that several months have elapsed between the time when an agent received notice of the condition of property insured and the issuing of the policy, the notice coming in the course of the negotiations for the placing of the insurance does not as a matter of law disconnect the notice and the policy.¹⁹³ Notice received by the secretary of the insurer through an agent of the company at a different place than that where the property was situated and after the issuance of the policy, of the fact that a cotton gin was maintained in the insured building, is not such a notice as compelled the insurer to claim a forfeiture immediately.¹⁹⁴ It is not a reason for the avoidance of a policy that there was a failure to state all the material facts in the application, when such facts were known to the insurer's agent who wrote the application;¹⁹⁵ nor that the premises were used for purposes other than those set forth in the application and policy when the agent had full knowl-

¹⁹¹ *Shaffer v. Milwaukee Mechanics' Ins. Co.*, 17 Ind. App. 204, 46 N. E. 557.

¹⁹² *Merchants' Ins. Co. v. New Mexico Lumber Co.*, 10 Colo. App. 223, 26 Ins. Law J. 969, 51 Pac. 174.

¹⁹³ *Weber v. Germania Fire Ins. Co.*, 16 App. Div. 596, 44 N. Y. Supp. 976.

¹⁹⁴ *Texas Banking & Insurance Co. v. Hutchins*, 53 Tex. 61.

¹⁹⁵ *Post*, note 199; *Aetna Life Ins. Co. v. Paul*, 10 Ill. App. 431.

edge of all the uses when he received the application.¹⁹⁶ If a policy is issued solely upon the judgment of the agent of the insurer after an inspection of the premises covered by it, his knowledge as to the character of the property and the manner of its use before it was insured is the knowledge of the company.¹⁹⁷

WHAT AN AGENT MAY WAIVE.

§ 96. Since the acts and knowledge of the agent, within the limitations already defined, are chargeable to and bind his principal, and

Since, as we shall hereafter see, the insurer waives

(a) The existence of prohibited conditions in, or

(b) Forbidden use of the property insured by issuing a policy with knowledge of such conditions or use, it follows:

- (1) That an agent authorized to issue policies can bind his principal by insuring property with actual knowledge of a breach of the conditions of the policy: and that
- (2) The issuing or renewing of a policy of insurance by an agent who has knowledge of an existing breach of conditions is a waiver by the insurer of such breach: and
- (3) Will estop the insurer from insisting upon a forfeiture on account of such breach.

From what has already been said, it is evident that all knowledge concerning the condition, use, ownership, occupancy or title of property about to be insured, and all knowledge of any facts concerning a life about to be insured, and all knowledge in any way material to or in any manner affecting the risk about to be insured, whatever be the form or nature of the insurance, which comes to an agent whether in soliciting insurance, or in receiving applications, or in or

¹⁹⁶ *Imperial Fire Ins. Co. v. Shimer*, 96 Ill. 580. But see *Birmingham Fire Ins. Co. v. Kroegher*, 83 Pa. St. 64.

¹⁹⁷ *Brink v. Merchants' & Mechanics' Ins. Co.*, 49 Vt. 442.

about the making of the contract or issuing the policy, becomes the knowledge of his principal. The conditions and stipulations usually found in policies of insurance, e. g. prohibiting certain use of the insured property, against change in title, or encumbrance or other insurance or vacancy, etc., are inserted for the protection and benefit of the insurer by whom they may be waived; and an insurer by issuing a policy waives all objections on account of matters (concerning the insured property) of which it had prior knowledge; and those matters cannot be set up to defeat an action on the policy.

It follows, therefore, that the knowledge of an agent authorized to issue policies, of facts which render the policy voidable at the insurer's option, is the knowledge of the insurer; and if, with knowledge of such facts, the agent issues a policy, which but for such knowledge would have been voidable or even absolutely void, the insurer will be estopped to assert any defense arising out of the facts so known to its agent, and will be held to have waived all rights to avoid the policy, because of such facts. This is so, even if the policy denies the right of an agent to waive any of its provisions, or prohibits any waiver, except in writing indorsed upon the policy or attached thereto. An insurance company cannot relieve itself from the legal consequences which the knowledge of its agent imposes upon it by providing in the policy that "the use of general terms, or anything less than a distinct, specific agreement, clearly expressed and indorsed on the policy, shall not be construed as a waiver of any printed or written condition or restriction therein;" that the agent "has no authority to waive, modify or strike from the policy any of its printed conditions;" that his assent to an increase of risk is not binding upon the company until it is indorsed upon the policy and the increased premium paid;

and that, in case the policy shall become void by the violation of any condition thereof, the agent has no power to revive it;¹⁹⁸ nor by a provision of the policy that no person except the president or secretary is authorized to make alterations or discharge contracts or waive forfeitures.¹⁹⁹

¹⁹⁸ *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 108; *Trustees of St. Clara Female Academy v. Northwestern Nat. Ins. Co.*, 98 Wis. 257, 73 N. W. 768; *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29; *Patridge v. Commercial Fire Ins. Co.*, 17 Hun (N. Y.), 95; *Whited v. Germania Fire Ins. Co.*, 76 N. Y. 415; *Forward v. Continental Ins. Co.*, 142 N. Y. 382, 25 L. R. A. 637; ante, note 96.

¹⁹⁹ *John Hancock Mut. Life Ins. Co. v. Schlink*, 175 Ill. 284, 51 N. E. 795. See, also, *Russell v. Detroit Mut. Fire Ins. Co.*, 80 Mich. 407, 45 N. W. 356; *Kausal v. Minnesota Farmers' Mut. Fire Ins. Ass'n*, 31 Minn. 17; *Germania Life Ins. Co. v. Koehler*, 168 Ill. 293, 48 N. E. 297; *Home Ins. Co. v. Mendenhall*, 164 Ill. 458; *McGurk v. Metropolitan Life Ins. Co.*, 56 Conn. 528, 1 L. R. A. 563; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; *Boetcher v. Hawkeye Ins. Co.*, 47 Iowa, 253; *German Ins. Co. v. Gray*, 43 Kan. 497, 8 L. R. A. 70; *Firemen's Ins. Co. v. Horton*, 170 Ill. 258; *Richmond v. Niagara Falls Ins. Co.*, 79 N. Y. 230; *Smith v. Commonwealth Ins. Co.*, 49 Wis. 322; *Oakes v. Manufacturers' F. & M. Ins. Co.*, 135 Mass. 248; *Compare Pottsville Mut. Fire Ins. Co. v. Fromm*, 100 Pa. St. 347; *Alston v. Greenwich Ins. Co.*, 100 Ga. 282, 29 S. E. 266.

Illustrations of Waiver of Conditions of Policy.

Requiring sole and unconditional ownership: A provision in a policy for forfeiture in case the title of the assured is other than sole and unconditional ownership is waived, notwithstanding a provision prohibiting the agent from waiving any of its conditions, except in writing upon or attached thereto, where the agent soliciting the insurance receives and transmits the application, delivers the policy, and receives the premium with knowledge that the assured does not own the sole and unconditional title. *Scott v. German Ins. Co.*, 69 Mo. App. 337; *Home Ins. Co. v. Duke*, 84 Ind. 253; *Phenix Ins. Co. v. Searles*, 100 Ga. 97, 27 S. E. 779; *Caldwell v. Fire Ass'n of Philadelphia*, 177 Pa. St. 492; *Graham v. American Fire Ins. Co.*, 48 S. C. 195, 26 S. E. 323; *Germania Fire Ins. Co. v. Hick*, 125 Ill. 361; *Trustees of St. Clara Female Academy v. Northwestern Ins. Co.*, 98 Wis. 257, 73 N. W. 767. But see, contra, *Liverpool & L. & G. Ins. Co. v. Van Os*, 63 Miss. 431.

And so with a condition against additional insurance. *Home*

FRAUD AND MISTAKE OF AGENT.

§ 97. The insurer is bound by the act of its agent who, either intentionally or negligently, writes false answers in an application, which the applicant signs in good faith, believing that it contains the answers he has given.

Where an applicant for insurance answers fully and honestly, but the agent of the insurer intentionally or negligently writes false and untrue answers, or omits to write

Fire Ins. Co. v. Wood, 50 Neb. 381, 69 N. W. 941; Gandy v. Orient Ins. Co., 52 S. C. 224, 29 S. E. 655; Erb v. Fidelity Ins. Co., 99 Iowa, 727, 69 N. W. 261; Strauss v. Phenix Ins. Co., 9 Colo. App. 386, 48 Pac. 822; Schroeder v. Springfield F. & M. Ins. Co., 51 S. C. 180, 28 S. E. 371; Gans v. St. Paul F. & M. Ins. Co., 43 Wis. 108.

And a condition against vacancy: Jordan v. State Ins. Co., 64 Iowa, 216; Prendergast v. Dwelling House Ins. Co., 67 Mo. App. 427; Menk v. Home Ins. Co., 76 Cal. 51.

And a condition against incumbrance: Harding v. Norwich Union Fire Ins. Soc., 10 S. D. 64, 71 N. W. 755; Crescent Ins. Co. v. Camp, 71 Tex. 503; Russell v. Detroit Mut. Fire Ins. Co., 80 Mich. 407; Phenix Ins. Co. v. Warttemberg (C. C. A.), 79 Fed. 245, 26 Ins. Law J. 552.

Against misrepresentation or concealment: By issuing a policy with knowledge of the true condition of the title of the property insured, insurer is estopped to claim a breach of a condition of the policy rendering it void if the insured shall have concealed or misrepresented any material fact or circumstance concerning the subject of the insurance. Queen Ins. Co. v. May (Tex.), 43 S. W. 73; Firemen's Ins. Co. v. Horton, 170 Ill. 258; Graham v. American Fire Ins. Co., 48 S. C. 195, 26 S. E. 323.

Iron-safe clause: But the waiver of an iron-safe clause by an agent at the time of issuing the policy is ineffectual, when the policy stipulates against the power of the agent to waive conditions. Post, note 235; Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co., 13 Tex. Civ. App. 64, 35 S. W. 955. Contra, Home Fire Ins. Co. v. Gurney, 56 Neb. 306, 76 N. W. 553. An agent cannot waive a provision that "no insurance would be binding until actual payment of the premium" where the policy itself contains a provision that none of the terms can be waived by any one except the secretary of the company. Wilkins v. State Ins. Co., 43 Minn. 177. The knowledge of the general agent of an insurer of the custom of stove merchants

down some answers in the application, and the applicant signs his name thereto in good faith believing that it contains the answers he has given, the company is bound by the act of its agent, and cannot relieve itself from liability on account of the mistake, omission or representations in the application.²⁰⁰ Where a mistake in issuing a policy, as

to use and have on the premises gasoline for the purpose of exhibiting stoves, and of the fact that the insured has been in the habit of so using gasoline, has no effect, either as an estoppel or as a waiver of a clause avoiding the policy for the use or keeping of gasoline upon the premises, "notwithstanding any usage or custom of trade or manufacture." *Fischer v. London & L. Fire Ins. Co.*, 83 Fed. 807. *In Cases of Life Insurance:*

A policy is not rendered void by a statement in the application that the applicant had never used intoxicating liquors except occasionally, and had never been other than a sober and temperate man, where the agent knew that the applicant had taken the Keeley treatment for the liquor habit. *De Witt v. Home Forum Ben. Order*, 95 Wis. 305, 70 N. W. 476. And notice to an agent authorized to receive premiums that an insured from whom he receives a premium is residing in prohibited territory, contrary to the prohibition of the policy, is notice to the company. *Germania Life Ins. Co. v. Koehler*, 168 Ill. 293, 48 N. E. 297; *Quinn v. Metropolitan Life Ins. Co.*, 10 App. Div. 483, 41 N. Y. Supp. 1060. But see *Flynn v. Equitable Life Assur. Soc.*, 67 N. Y. 500, where the court held the medical examiner was not the insurer's agent in filling out the application, where the statements in the application were stipulated to be warranties.

²⁰⁰ *Phoenix Ins. Co. v. Warttemberg (C. C. A.)*, 79 Fed. 245, 26 Ins. Law J. 552; *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274; *Swan v. Watertown Fire Ins. Co.*, 96 Pa. St. 37; *German Ins. Co. v. Gray*, 43 Kan. 497, 8 L. R. A. 70; *Whitney v. National Masonic Acc. Ass'n*, 57 Minn. 472; *Phenix Ins. Co. v. Golden*, 121 Ind. 524; *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737; *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex. 338, 7 L. R. A. 217; *Smith v. Farmers' & Mechanics' Mut. Fire Ins. Co.*, 89 Pa. St. 287; *Gray v. National Ben. Ass'n*, 111 Ind. 531, 11 N. E. 477; *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304; *Farmers' Ins. Co. v. Williams*, 39 Ohio St. 584; *Coles v. Jefferson Ins. Co.*, 41 W. Va. 261, 23 S. E. 732; *O'Farrell v. Metropolitan Life Ins. Co.*, 22 App. Div. 495, 48 N. Y. Supp. 199, 695. But see *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519.

where it names a person not owner of the property insured as the person assured, is the fault of the agent, the principal cannot take advantage of it.²⁰¹ Nor can an insurer repudiate such fraud or mistake of its agent, and thus escape the obligations of its contracts, merely because the assured accepted in good faith the act of the agent without examination;²⁰² or take advantage of a provision forfeiting the premiums if the warranties are not true; but upon canceling the policy must return the unearned premium;²⁰³ or of a misstatement in the application, if the insured stated the facts truthfully and in good faith, where the application was written by the agent and assented to by the assured in reliance upon the advice and superior knowledge of the agent;²⁰⁴ and knowledge that an insurance agent cannot issue a policy, does not prevent an applicant from relying upon him to write the answers in the application.²⁰⁵

Misrepresentations of Agents.

An insurance company is bound by the misrepresentations of its agent while acting within the general scope of his authority. It is liable to third parties in a civil action for frauds, deceits, concealments, misrepresentations, and omissions of duty of its general agent in the course of his employment, although his misconduct was not authorized or ratified by it, when his acts are apparently within the scope

²⁰¹ *Poughkeepsie Sav. Bank v. Manhattan Fire. Ins. Co.*, 30 Hun (N. Y.), 473; *Vezina v. Canada F. & M. Ins. Co.*, 9 Quebec Law Rep. 65.

²⁰² *Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 553, 5 L. R. A. 646.

²⁰³ *McDonald v. Metropolitan Life Ins. Co.* (N. H.), 38 Atl. 500.

²⁰⁴ *Phoenix Ins. Co. v. Warttemberg* (C. C. A.), 79 Fed. 245, 26 Ins. Law J. 552.

²⁰⁵ *Bowlus v. Phenix Ins. Co.*, 133 Ind. 106, 20 L. R. A. 400.

of his authority, though not so in fact.²⁰⁶ Fraudulent misrepresentations made by a solicitor to an applicant concerning the terms of the policy to be issued, are ground for rescission of the contract, although the policy contained a provision that no statements made by the agent should bind the company.²⁰⁷ An insurance company is estopped to deny the renewal of a policy when its agents authorized to make contracts of insurance represented to the insured that it had been renewed, and received and appropriated money which they had good reason to believe was paid to cover the cost of renewal.²⁰⁸ Where defendant's agent represented that plaintiff might use a stove on board the vessel insured when he was fitting her up for use in the spring, though his book of instructions provided that the risk was to include ordinary refitting in the spring, and that the policy was to specify the kind of fuel to be burned, it was held that defendant was bound by the representation, and the risk included the use of a stove for that purpose.²⁰⁹ But a misrepresentation by a soliciting agent as to the conditions of the policies of a rival company, is not such fraud as to relieve the insured from his contract to pay a premium, where the means of information were equally open to both parties;²¹⁰ and false statements by an agent inducing a settlement of a loss are not actionable.²¹¹

²⁰⁶ *New York Life Ins. Co. v. McGowan*, 18 Kan. 300; *Hopkins v. Hawkeye Ins. Co.*, 57 Iowa, 203.

²⁰⁷ *McCarty v. New York Life Ins. Co.*, 74 Minn. 530, 77 N. W. 426. And by taking a premium note payable to himself, *First Nat. Bank of Dubuque v. Getz*, 96 Iowa, 139, 64 N. W. 799; *Godfrey v. New York Life Ins. Co.*, 70 Minn. 224, 73 N. W. 1.

²⁰⁸ *International Trust Co. v. Norwich Union Fire Ins. Soc.*, 17 C. C. A. 608, 71 Fed. 81; *McCabe v. Aetna Ins. Co. (N. D.)*, 81 N. W. 426; post, notes 253--255.

²⁰⁹ *Lyon v. Stadacona Ins. Co.*, 44 Up. Can. Q. B. 472.

²¹⁰ *American Steam-Boiler Ins. Co. v. Wilder*, 39 Minn. 350.

²¹¹ *Thompson v. Phoenix Ins. Co.*, 75 Me. 55.

While the insured is justified in looking to the agent for information and directions in the preparation of the application, and may rely on a reasonable construction put upon an ambiguous provision of a policy by an agent of the insurer, he cannot assert the representations and promises of the agent against the plain and unambiguous terms and stipulations of the policy. When the policy is executed and delivered it becomes the contract of the parties. In it all prior negotiations and transactions of the parties are merged. If it is not the contract for which the insurer bargained, he can refuse to accept it; but he cannot accept it and make it the basis of a claim against the insurer without subscribing to all its terms and conditions.²¹² Thus, where it was provided in the policy that no representations made by the person who procured the application therefor should be binding on the company unless reduced to writing and presented to the officers of the company at the home office, a New York court held that statements made by an agent and not reduced to writing could not be proven in an action against the company for false representations, and breach of contract based thereon; that where a pamphlet, issued by the company, contained a full and true statement of the plan of insurance adopted, and there was no concealment or misrepresentation concerning it, contemporaneous suggestions made by the agent of the company as to the comparative superiority of the plan were recommendations and expressions of his own opinion, related to the future, and were not imputable to the company.²¹³ In Maryland an insurer brought suit to recover on a premium

²¹² *Union Mut. Life Ins. Co. v. Mowry*, 96 U. S. 544; *Wilkins v. State Ins. Co.*, 43 Minn. 177; *Quinlan v. Providence Wash. Ins. Co.*, 133 N. Y. 360.

²¹³ *Simons v. New York Life Ins. Co.*, 38 Hun (N. Y.), 309; *Ebert v. Mutual Reserve Fund Ass'n*, 81 Minn. 116, 83 N. W. 507.

note containing a promise that the maker would pay "in such portions, and at such time or times, as the directors of said company may, agreeably to their act of incorporation, require." The act made all insured by the corporation members of it, and provided that the balance due on any premium should be payable in part or wholly at the discretion of the directors. The application signed by insured recited that the company would not be bound by any act or statement made to or by the agent, restricting its rights or varying its written or printed contract, unless inserted therein in writing. Oral evidence was held inadmissible to show that when the insurance was effected the company's general agent represented to defendant that he had made special arrangements with the company whereby defendant would be liable to pay only a certain per cent. on his note.²¹⁴

COLLUSION BETWEEN AGENT AND INSURED.

§ 98. The agent does not bind the insurer by any act done in furtherance of a fraudulent and collusive agreement between him and the insured.

As has been seen, an agent is appointed to further the interests of his principal, and will not be permitted, without his principal's full knowledge and consent, to represent the other party also in the same transaction. No one can suppose that an insurer clothes an agent with authority to perpetrate a fraud upon itself. When an agent is perpetrating a fraud upon his principal in furtherance of an agreement between himself and any third party there is no agency in respect to that transaction; and to hold his principal responsible for his acts and in favor of the one with whom the agent colludes, would be a monstrous injustice. If the assured is a party

²¹⁴ *Lycoming Fire Ins. Co. v. Langley*, 62 Md. 196.

to or an accomplice in, or participates in the fraudulent act, he cannot take advantage of it.²¹⁵ Thus where a false statement was made by the insured concerning his health, and the answers were the basis of the contract, which provided that if they were untrue the policy would be void, and the agent had knowledge of the falsity, it was held that notice to the agent did not operate as notice to the company; that the agent had no authority to accept false answers and that the false statement was a fraud which could not be taken advantage of by the representatives of the party who made it.²¹⁶ But it has been held where the insurer's agents solicited a party to insure his life, which he refused to do, but suggested taking a policy in his father's name on his father's life, for his own benefit, and without the knowledge of the father and with that of the agents, application was made in the name of the former, and a policy issued as if he had made the application, that the knowledge and privity of the agents prevented the transaction from being a fraud upon the company.²¹⁷

SAME — KNOWLEDGE OF AGENT THAT WARRANTIES ARE FALSE.

§ 99. Many authorities hold that where by the terms of the policy the statements made in the application are warranties, the agent's knowledge of the untruth or falsity of such statements before the delivery of the policy does not bind the insurer, except in cases where the relation and status of the agent is fixed by statute.

This is the view taken by the supreme court of the United States and by the federal courts. In the case of *New York*

²¹⁵ *Lewis v. Phoenix Mut. Life Ins. Co.*, 39 Conn. 100; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519.

²¹⁶ *Galbraith's Adm'r v. Arlington Mut. Life Ins. Co.*, 12 Bush (Ky.), 29; *Smith v. Cash Mut. Fire Ins. Co.*, 24 Pa. St. 323; *Lowell v. Middlesex Mut. Fire Ins. Co.*, 8 Cush. (Mass.) 127; *Ketcham v. American Mut. Acc. Ass'n*, 117 Mich. 521, 76 N. W. 5; *Cook v. Standard Life & Acc. Ins. Co.*, 84 Mich. 12, 47 N. W. 568.

²¹⁷ *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35.

Life Ins. Co. v. Fletcher, a person had applied in St. Louis to an agent of the company for an insurance on his life. The agent, under general instructions, questioned him on subjects material to the risk. He made answers which, if correctly written down, and transmitted to the company, would have probably caused it to decline the risk. The agent, without the knowledge of the applicant, wrote down false answers, concealing the truth, which were signed by the applicant without reading, and by the agent transmitted to the company, and the company thereupon assumed the risk. It was conditioned in the policy that the application and answers were parts of it, and it was stipulated in the application that the answers therein were warranties and that no statement to the agent not thus transmitted should be binding on his principal; and a copy of the answers with these conditions conspicuously printed upon it, was attached to the policy.

Field, J., said: "It is conceded that the statements and representations contained in the answers, as written, of the assured to the questions propounded to him in his application, respecting his past and present health, were material to the risk to be assumed by the company, and that the insurance was made upon the faith of them, and upon his agreement accompanying them, that if they were false in any respect, the policy to be issued upon them should be void. It is sought to meet and overcome the force of this conceded fact by proof that he never made the statements and representations to which his name is signed; that he truthfully answered those questions; that false answers written by an agent of the company were inserted in place of those actually given, and were forwarded with the application to the home office; and it is contended that, such proof being made, the plaintiff is not estopped from recovering. But on the assumption that the fact as to the answers was as stated, and that no further obligation

rested upon the assured in connection with the policy, it is not easy to perceive how the company can be precluded from setting up their falsity, or how any rights upon the policy ever accrued to him. It is, of course, not necessary to argue that the agent had no authority from the company to falsify the answers, or that the assured could acquire no right by virtue of his falsified answers. Both he and the company were deceived by the fraudulent conduct of the agent. The assured was placed in the position of making false representations in order to secure a valuable contract which, upon a truthful report of his condition, could not have been obtained. By them the company was imposed upon and induced to enter into the contract. In such a case, assuming that both parties acted in good faith, justice would require that the contract be canceled and the premiums returned. As the present action is not for such a cancellation, the only recovery which the plaintiff could properly have upon the facts he asserts, taken in connection with the limitation upon the powers of the agent, is for the amount of the premiums paid, and to that only would he be entitled by virtue of the statute of Missouri."

"But the case as presented by the record is by no means as favorable to him as we have assumed. It was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions, if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made, or business fairly conducted, if such a rule should prevail; and there is no reason why it should be

applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others. But here the right is asserted to prove not only that the assured did not make the statements contained in his answers, but that he never read the application, and to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed lines of his application, he would have seen that it stipulated that the rights of the company could in no respect be affected by his verbal statements, or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed.

* * * He is, therefore, bound by its statements. * * * If the policy can stand with the application avoided, it must stand upon parol statements not communicated to the company. This, of course, cannot be seriously maintained in the face of its notice that only statements in writing forwarded to its officers would be considered. A curious result is the outcome of the instruction. If the agents committed no fraud the plaintiff cannot recover, for the answers reported are not true; but if they did commit the imputed fraud he may recover, although, upon the answers actually given, if truly reported, no policy would have issued. Such anomalous conclusions cannot be maintained."

"There is another view of this case equally fatal to a recovery. Assuming that the answers of the assured were falsified, as alleged, the fact would be at once disclosed by the copy of the application, annexed to the policy, to which his attention was called. He would have discovered by inspec-

tion that a fraud had been perpetrated, not only upon himself but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agents and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of its statements. The consequences of that approval cannot after his death be avoided." No one can claim the benefit of an executory contract fraudulently obtained, after the discovery of the fraud, without approving and sanctioning it.²¹⁸ In a later case this court sustained a statutory

²¹⁸ 117 U. S. 519; ante, note 173; *Globe Mut. Life Ins. Co. v. Wolff*, 95 U. S. 329; *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 240; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Ryan v. World Mut. Life Ins. Co.*, 41 Conn. 168; *Lewis v. Phoenix Mut. Life Ins. Co.*, 39 Conn. 100; *Simons v. New York Life Ins. Co.*, 38 Hun (N. Y.), 309; *Lycoming Fire Ins. Co. v. Langley*, 62 Md. 196; *American Ins. Co. v. Neiberger*, 74 Mo. 167; *Richardson v. Maine Ins. Co.*, 46 Me. 394; *Reynolds v. Atlas Acc. Ins. Co.*, 69 Minn. 94; *Singleton v. Prudential Ins. Co.*, 11 App. Div. (N. Y.) 403; *Phoenix Ins. Co. v. Warttemberg*, 26 Ins. Law J. 552 (C. C. A.), 79 Fed. 245; *Ketcham v. American Mut. Acc. Ass'n*, 117 Mich. 521, 76 N. W. 5; *Maier v. Fidelity Mut. Life Ass'n*, 47 U. S. App. 322, 78 Fed. 566, 26 Ins. Law J. 292; *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527; *Cook v. Standard Life & Acc. Ins. Co.*, 84 Mich. 12; *Gould v. Dwelling House Ins. Co.*, 90 Mich. 302; *Ward v. Metropolitan Life Ins. Co.*, 66 Conn. 227. For similar holdings where the application limits agent's powers, though statements are not warranties, see *McCoy v. Metropolitan Life Ins. Co.*, 133 Mass. 82; *Bernard v. United Life Ins. Ass'n*, 14 App. Div. 142, 43 N. Y. Supp. 527; *Shannon v. Gore District Mut. Fire Ins. Co.*, 37 Upper Can. Q. B. 380 (one judge dissenting).

Where the statements of insured are made warranties, knowledge of insurer's agent that they are untrue does not bind insurer. *Foot v. Aetna Life Ins. Co.*, 61 N. Y. 571; *Flynn v. Equitable Life Ass. Soc.*, 67 N. Y. 500. Otherwise if statements are not warranties. *Rohrbach v. Aetna Ins. Co.*, 62 N. Y. 613; *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281, 92 N. Y. 274. For holdings adverse to *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, see *German Ins. Co. v. Gray*, 43 Kan. 497, 8 L. R. A. 70; *Phenix Ins. Co. v. Golden*,

provision making the person soliciting the insurance the company's agent, notwithstanding a contrary stipulation in the application, and held that in such case the rule established in *New York Life Ins. Co. v. Fletcher* did not apply, and that the act and knowledge of the agent bound the company.²¹⁹

POWER OF AGENT AFTER ISSUANCE OF POLICY.

§ 100. An insurance agent who has authority to take risks and issue policies can, in the absence of known restrictions placed on his authority either by his principal or by statutory enactment, waive the conditions of the policy after it has been issued.²²⁰

Following the rule that the powers of an agent are co-extensive with the business entrusted to his care, and that he is possessed of all the authority necessary to the full and complete discharge of his duty to his principal, it has been held that, in the absence of any known limitations of his presumptive authority, an agent invested with power to issue policies has authority to cancel them;²²¹ to consent to alterations in the insured property;²²² to consent to the assignment of a pol-

121 Ind. 524; *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737; *Smith v. Farmers' & Mechanics' Mut. Fire Ins. Co.*, 89 Pa. St. 287; *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex. 338, 7 L. R. A. 217.

²¹⁹ *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304.

²²⁰ *Niagara Fire Ins. Co. v. Brown*, 123 Ill. 356; *Grubbs v. North Carolina Ins. Co.*, 108 N. C. 472; *May, Ins.* § 511; *Germania Life Ins. Co. v. Koehler*, 63 Ill. App. 188, 168 Ill. 293; *Alexander v. Continental Ins. Co.*, 67 Wis. 422; *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222. As to right of agents to waive conditions of standard policy, see *Straker v. Phenix Ins. Co.*, 101 Wis. 413, 77 N. W. 753; *Anderson v. Manchester Fire Assur. Co.*, 59 Minn. 189; *Hicks v. British American Assur. Co.*, 162 N. Y. 284, 48 L. R. A. 428.

²²¹ *Runkle v. Citizens' Ins. Co.*, 6 Fed. 143.

²²² *Packard v. Dorchester Mut. Fire Ins. Co.*, 77 Me. 144.

icy;²²³ to correct the policy before loss so as to make it correspond with the real agreement of the parties;²²⁴ to consent to the sale and encumbering of the property;²²⁵ to consent to other insurance in other companies contrary to the conditions of the policy;²²⁶ to waive the conditions of the policy regarding the use of gasoline on the premises;²²⁷ to consent to the removal of the property insured;²²⁸ to waive a condition of a policy avoiding it if the insured is not in sound health at date of execution of policy;²²⁹ to bind the insurer by his failure to make a proper indorsement on the policy, upon being inquired of about the necessity therefor;²³⁰ to waive the conditions of a life insurance policy forbidding the assured to reside within certain specified territory.²³¹

An insurance company, whose authorized agent assures the assignee for creditors of the insured after such assignee has sold the insured property, that the policy need not be transferred until after the deed is made to the purchaser, and which subsequently claims from the assignee an assessment for another loss, cannot escape liability for a loss occurring before the execution of the deed on the ground that there

²²³ *Chauncey v. German American Ins. Co.*, 60 N. H. 428; *Springfield F. & M. Ins. Co. v. Davis* (Ky.), 37 S. W. 582; *Frane v. Burlington Ins. Co.*, 87 Iowa, 288, 54 N. W. 237; *German Ins. Co. v. Penrod*, 35 Neb. 273, 53 N. W. 74.

²²⁴ *Taylor v. State Ins. Co.*, 98 Iowa, 521, 67 N. W. 577; *Warner v. Peoria M. & F. Ins. Co.*, 14 Wis. 345.

²²⁵ *Manchester v. Guardian Assur. Co.*, 151 N. Y. 88; *Silverberg v. Phenix Ins. Co.*, 67 Cal. 36; *Rediker v. Queen Ins. Co.*, 107 Mich. 224, 65 N. W. 105; *King v. Cox*, 63 Ark. 204, 37 S. W. 877.

²²⁶ *Schomer v. Hekla Fire Ins. Co.*, 50 Wis. 575.

²²⁷ *Arkell v. Commerce Ins. Co. v.* 69 N. Y. 191, 7 Hun, 455.

²²⁸ *New England F. & M. Ins. Co. v. Schettler*, 38 Ill. 166.

²²⁹ *Hilt v. Metropolitan Life Ins. Co.*, 110 Mich. 517, 68 N. W. 300.

²³⁰ *Allen v. St. Louis Ins. Co.*, 85 N. Y. 473.

²³¹ *Germania Life Ins. Co. v. Koehler*, 168 Ill. 293.

has been no transfer of the policy;²³² and is bound by a notice to such agent that the premises have become vacant, although such knowledge was imparted to him as agent for the owner of the premises for the purpose of renting the same.²³³ An agent's authority to alter or modify a policy by oral or written agreement, may be inferred from a course of dealing acquiesced in by the principal,^{233a} even though the policy provided to the contrary.²³⁴ But a waiver of the "iron safe" clause by an insurance agent at the time of issuing a policy is ineffectual, where the policy stipulates against the power of the agent to waive conditions.²³⁵ When the policy provides that no action should be brought upon it unless it was begun within twelve months after loss or damage occurred, and the assured has assented to the stipulation by accepting the policy, it is not in the power of local agents or of adjusting agents, in the absence of express authority from the company's managing officers, to waive it after loss or damage had occurred, unless fraud has been perpetrated on the insured which induced him to delay bringing suit until after the bar of the contract attached.²³⁶

Power of Broker or Solicitor After Delivery of Policy.

An insurance broker or soliciting agent whose business is merely to solicit insurance, present applications therefor to

²³² *Highlands v. Lurgan Mut. Fire Ins. Co.*, 177 Pa. St. 566.

²³³ *Clay v. Phoenix Ins. Co.*, 97 Ga. 44, 25 S. E. 417.

^{233a} *Dey v. Mechanics' & Traders' Ins. Co.*, 88 Mo. 325.

²³⁴ *Knickerbocker Ins. Co. v. Norton*, 96 U. S. 234.

²³⁵ *Roberts v. Sun Mut. Ins. Co.*, 13 Tex. Civ. App. 64, 35 S. W. 955; *Quinlan v. Providence Wash. Ins. Co.*, 133 N. Y. 356; *Egan v. Westchester Ins. Co.*, 28 Or. 289, 42 Pac. 611; *East Texas Fire Ins. Co. v. Kempner*, 87 Tex. 229; *Sutherland v. Eureka F. & M. Ins. Co.*, 110 Mich. 668, 68 N. W. 985. Contra, *Home Fire Ins. Co. v. Gurney*, 56 Neb. 306, 76 N. W. 553. See ante, note 199.

²³⁶ *Underwriters' Agency v. Sutherlin*, 55 Ga. 266.

the agents of the insurance company, and if accepted to receive the policies, deliver them to the insured, and collect the premiums, has no further powers; and cannot thereafter bind the insurer by his consent to the procuring of other insurance on the property and cannot waive the provisions of the policy in that regard.²³⁷ Nor can he bind the company by subsequently altering the policy so as to make it payable to one other than the insured.²³⁸

KNOWN LIMITATIONS ON AGENT'S POWER.

§ 101. An agent cannot waive conditions contrary to his known instructions or in violation of known limitations of his power.

Where an insured applied to an agent for a vacancy permit and was told by the agent that the insurer would not allow him to issue such a permit, he cannot establish a waiver by the insurer of the provisions of the policy prohibiting vacancy by proof of an oral waiver thereafter made by the agent.²³⁹ Nor will the act of the agent in stating to the insured that it will not be necessary for him to keep a set of books in an iron safe as required by the policy, bind the insurer where the policy requires such a waiver to be in writing and attached to the policy.²⁴⁰

²³⁷ *Goldin v. Northern Assur. Co.*, 46 Minn. 471; *Duluth Nat. Bank v. Knoxville Fire Ins. Co.*, 85 Tenn. 76; *Oshkosh Match Works v. Manchester Fire Assur. Co.*, 92 Wis. 510, 66 N. W. 525; *Citizens' Fire Ins. Co. v. Swartz*, 21 Misc. Rep. 671, 47 N. Y. Supp. 1107; *Queen Ins. Co. v. Young*, 86 Ala. 424.

²³⁸ *Duluth Nat. Bank v. Knoxville Fire Ins. Co.*, 85 Tenn. 76, 4 Am. St. Rep. 744.

²³⁹ *Sutherland v. Eureka F. & M. Ins. Co.*, 110 Mich. 668, 68 N. W. 985; *McCleary v. Orient Ins. Co. (Tex.)*, 32 S. W. 583; *Jackson v. Mutual Ben. Life Ins. Co.*, 79 Minn. 44, 81 N. W. 545, 82 N. W. 366.

²⁴⁰ *Roberts v. Willis & Taylor Ins. Co.*, 13 Tex. Civ. App. 64, 35 S. W. 955; *Egan v. Westchester Ins. Co.*, 28 Or. 289, 42 Pac. 611; *East Texas Fire Ins. Co. v. Kempner*, 87 Tex. 229. See note 256.

WHAT CONSTITUTES WAIVER BY AGENT.

§ 102. The mere knowledge by an agent of the violation of the condition of a policy does not constitute a waiver. There must be some affirmative act or word evidencing an intention to waive the rights of the insurer.

Thus the agent's knowledge before the issuing of the policy, of the intention of the proposed insured to effect other insurance, will not render ineffective a stipulation avoiding the policy in case of such other insurance.²⁴¹

A condition as to the future use of the insured premises is not waived by the mere knowledge on the part of an agent of the insurer that the property is occupied for an unlawful use. His language and conduct must be such as to reasonably imply an intention to waive such condition or consent to such use; and the issuing of a permit to use the premises for an extra hazardous purpose for a specified period does not allow the continuation of the use beyond the time specified in the permit.²⁴²

SAME — LIMITATIONS FIXED BY POLICY.

§ 103. The insurer often limits and defines the powers of its agents by specific provisions of the policy. Among the more common provisions of this nature are

- (a) That only certain agents can waive the terms of the policy.
- (b) That no officer or agent can waive them.
- (c) That a waiver must be in writing indorsed on the policy.

After a policy is issued and accepted, the insured is bound to know and take notice of all its provisions limiting or restricting the powers of the agents of the insurer in their further dealings relating to the policy and the property insured.

²⁴¹ United Firemen's Ins. Co. v. Thomas (C. C. A.), 82 Fed. 406; Home Ins. Co. v. Wood, 50 Neb. 381, 69 N. W. 841; Sutherland v. Eureka F. & M. Ins. Co., 110 Mich. 668; Cable v. United States Ins. Co., 111 Fed. 31.

²⁴² Betcher v. Capital Fire Ins. Co., 78 Minn. 240; Concordia Fire Ins. Co. v. Johnson, 4 Kan. App. 7, 45 Pac. 722. See Straker v. Phenix Ins. Co., 77 N. W. 752.

If one dealing with an agent knows that he is acting under a circumscribed or limited authority and that his act is outside of and transcends the authority conferred, the principal is not bound; it is immaterial whether the agent is a general or a special one. Where restrictions upon the agent's power appear in a policy, the insured is bound to take notice of them; and in the absence of evidence tending to show that his powers have been enlarged by the usage of the company, its course of business, or by its consent express or implied, the policy must control and the authority, as limited, must be regarded as the measure of the agent's power,²⁴³ e. g. if an open policy provides only for the insurance of property owned or held in trust or on commission, or sold and not delivered, an agreement on the part of the agent to insure property not coming within such language is void.^{243a} Thus where a policy in terms denies to any agent, local or general, the power to waive any of its conditions and reserves that authority solely to the company or some officers of the company, a waiver by an agent cannot bind the company.²⁴⁴ A provision that no agent is empowered to waive any of the

²⁴³ *Quinlan v. Providence Wash. Ins. Co.*, 133 N. Y. 356; *Wilkins v. State Ins. Co.*, 43 Minn. 177; *Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.*, 13 Tex. Civ. App. 64, 35 S. W. 955; *Fowler v. Preferred Acc. Ins. Co.*, 100 Ga. 330, 28 S. E. 398; *Monitor Mut. Fire Ins. Co. v. Buffum*, 115 Mass. 343; *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527, 32 N. W. 660; *Merserau v. Phoenix Mut. Life Ins. Co.*, 66 N. Y. 274; *Catoir v. American Life Insurance & Trust Co.*, 33 N. J. Law, 487; *Northwestern Nat. Ins. Co. v. Mize (Tex.)*, 34 S. W. 670; *Burlington Ins. Co. v. Gibbons*, 43 Kan. 15, 19 Am. St. Rep. 118; *Weidert v. State Ins. Co.*, 19 Or. 261, 20 Am. St. Rep. 809. But see *Home Ins. Co. v. Gilman*, 112 Ind. 7.

^{243a} *First Nat. Bank of Waxahachie v. Lancashire Ins. Co.*, 62 Tex. 461.

²⁴⁴ *Marvin v. Universal Life Ins. Co.*, 85 N. Y. 278; *Hale v. Mechanics' Mut. Fire Ins. Co.*, 6 Gray (Mass.), 169; *Wilkins v. State Ins. Co.*, 43 Minn. 177.

conditions of the policy without special authorization refers to special, not general, agents.²⁴⁵ These limitations are for the benefit of the company and may be insisted upon or waived by it. The company is not bound to act upon its declarations in the policy that its agents have limited powers; it may at any time by course of dealing or by contract give them unlimited authority.²⁴⁶ A restriction in a policy upon an agent's authority cannot be construed to refer to his acts or knowledge prior to the delivery of the policy.²⁴⁷

SAME — STIPULATIONS THAT ONLY CERTAIN OFFICERS CAN
WAIVE.

§ 104. A condition in a policy of insurance that its terms can be changed by certain agents only, is valid.

The forfeiture of a contract of insurance, or a condition which is essential to the continuance of such contract, cannot be waived by an agent when the contract itself declares (a) that he shall not have power to waive it, or, (b) that only certain officers of the company, which do not include him, shall have such power; unless it appears that subsequent to the execution of the contract, authority has been given to the agent to waive the forfeiture or condition, or the company has knowingly permitted him to exercise such power.²⁴⁸ In a Wisconsin case the policy was issued to the owner, payable to a mortgagee as interest should appear, conditioned that if the property should thereafter be incumbered without the

²⁴⁵ *Carrigan v. Lycoming Fire Ins. Co.*, 53 Vt. 418.

²⁴⁶ *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234; *Godfrey v. New York Life Ins. Co.*, 70 Minn. 224, 73 N. W. 1.

²⁴⁷ *Crouse v. Hartford Fire Ins. Co.*, 79 Mich. 249, 44 N. W. 497; *Zell v. Herman Farmers' Mut. Ins. Co.*, 75 Wis. 521, 44 N. W. 828.

²⁴⁸ *Porter v. United States Life Ins. Co.*, 160 Mass. 183; *Lyndsay v. Niagara Dist. Mut. Fire Ins. Co.*, 28 Up. Can. Q. B. 326; *Wilkins v. State Ins. Co.*, 43 Minn. 177.

consent of insurer's secretary in writing, the policy was to become void. It was expressed in the policy "that no officer, agent or employe, or any person or persons, except the secretary in writing, can in any manner waive any of the conditions of this policy, which is made and accepted on the above express conditions." During the life of the policy the mortgage existent when the policy issued was paid, and another mortgage was issued without consent. Held, that a local agent could not bind his principal by verbal consent to the execution of a second mortgage.²⁴⁹

SAME—STIPULATIONS THAT NO OFFICER CAN WAIVE.

§ 105. A provision "that no officer, agent or representative can waive any of the provisions except in writing indorsed thereon" is void.

This restriction is so broad that it applies alike to every officer, agent and representative of the company; and, as a corporation can only act through such agencies, the substance of the provision is that the company shall not be held to have waived any of the terms or conditions of the policy unless its waiver be expressed by a written endorsement on the policy. That is to say, in other words, that one of the parties

²⁴⁹ *Hankins v. Rockford Ins. Co.*, 70 Wis. 1, 35 N. W. 34; *Merserau v. Phenix Mut. Life Ins. Co.*, 66 N. Y. 274; *Marvin v. Universal Life Ins. Co.*, 85 N. Y. 278; *O'Reilly v. Corporation of London Assur. Co.*, 101 N. Y. 575; *Kyte v. Commercial Union Assur. Co.*, 144 Mass. 43; *McIntyre v. Michigan State Ins. Co.*, 52 Mich. 188; *Bowlin v. Hekla Fire Ins. Co.*, 36 Minn. 433; *Shuggart v. Lycoming Fire Ins. Co.*, 55 Cal. 408; *Enos v. Sun Ins. Co.*, 67 Cal. 621; *Leonard v. American Ins. Co.*, 97 Ind. 299; *Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 516; *Universal Mut. Fire Ins. Co. v. Weiss*, 106 Pa. St. 20; *Pottsville Mut. Fire Ins. Co. v. Minnequa Springs Imp. Co.*, 100 Pa. St. 137; *Stark County Mut. Ins. Co. v. Hurd*, 19 Ohio, 149; *Evans v. Trimountain Mut. Fire Ins. Co.*, 9 Allen (Mass.), 329. But see *Planters' Ins. Co. v. Rowland*, 66 Md. 236.

to a contract, which is not required by law to be in writing, cannot, subsequent to the making of the contract, waive, by parol, provisions which had been incorporated into the contract for his own benefit. A contracting party cannot so tie his own hands and so restrict his own legal capacity for future action, that he has not the power even with the assent of the other party to bind or obligate himself by his further action or agreement contrary to the terms of the written contract. Except where prevented by the operation of the Statute of Frauds, or some equivalent prohibition, a policy of insurance may be made or changed by parol. A written agreement is (subject to these exceptions) of no higher legal degree than a parol one, and either may vary or discharge the other; and one who has agreed that he will only contract by writing in a certain way does not thereby preclude himself from making a parol bargain to change it. There is no more force in an agreement in writing not to agree by parol, than in a parol agreement not to contract in writing. Such a provision does not in any way limit the legal capacity of an insurer to act through its authorized agents in the ordinary manner, nor prohibit them from waiving such provisions or conditions as they could otherwise waive.²⁵⁰

Contra.

Speaking of this provision the supreme court of Iowa recently said: "There is some conflict in the authorities as to

²⁵⁰ *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143; *Lamberton v. Connecticut Fire Ins. Co.*, 39 Minn. 131; *Joyce, Ins. § 433*; *American Cent. Ins. Co. v. McCrea*, 8 Lea (Tenn.), 513; *Von Bories v. United Life F. & M. Ins. Co.*, 8 Bush (Ky.), 133; *Maryland Fire Ins. Co. v. Gusdorf*, 43 Md. 506; *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234; *Stolle v. Aetna F. & M. Ins. Co.*, 10 W. Va. 546; *Carruge v. Atlantic Fire Ins. Co.*, 40 Ga. 135; *Wakefield v. Orient Ins. Co.*, 50 Wis. 532; *Whited v. Germania Fire Ins. Co.*, 76 N. Y. 415; *Morrison v. Insurance Co. of North America*, 69 Tex. 353.

whether this kind of an agreement or provision is valid or not. But we think the decided weight is in favor of the proposition that it is. * * * We do not mean to be understood as holding that the company could not itself, through its general agents, waive these provisions of the policy. What we do hold is that these provisions * * * are a limitation upon the power of its local, special, and adjusting agents, of which the plaintiffs had, or are presumed to have had, knowledge; and that any agreement or waiver which they attempted to make would not be binding upon the company because not authorized.”²⁵¹

SAME—STIPULATIONS THAT WAIVER MUST BE IN WRITING.

§ 106. An agent who is authorized to indorse a written waiver or consent to a violation of the conditions of a policy is sometimes held to have authority to waive the same conditions

- (a) By an oral agreement to waive;
- (b) By acts which in law amount to waiver;
- (c) By representations which will estop the insurer from denying the waiver.

The decisions on this question are irreconcilable. In Nebraska, Arkansas, Iowa, New Jersey, and Missouri, the authority of the agents of the insured to waive the conditions

²⁵¹ *Ruthven v. American Fire Ins. Co.*, 92 Iowa, 326, 60 N. W. 666, citing *Burlington Ins. Co. v. Gibbons*, 43 Kan. 15, 22 Pac. 1010; *Weidert v. State Ins. Co.*, 19 Or. 261, 24 Pac. 242; *Cleaver v. Traders' Ins. Co.*, 71 Mich. 414, 39 N. W. 571; *Quinlan v. Providence Wash. Ins. Co.*, 133 N. Y. 360; *Smith v. Niagara Fire Ins. Co.*, 60 Vt. 682, 15 Atl. 353; *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 5; *Hankins v. Rockford Ins. Co.*, 70 Wis. 1, 35 N. W. 34; *Gould v. Dwelling-House Ins. Co.*, 90 Mich. 302, 51 N. W. 455; *Clevenger v. Mutual Life Ins. Co.*, 2 Dak. 114, 3 N. W. 313; *Enos v. Sun Ins. Co.*, 67 Cal. 621, 8 Pac. 379; *Kyte v. Commercial Assur. Co.*, 144 Mass. 43, 10 N. E. 518; *Kirkman v. Farmers' Ins. Co.*, 90 Iowa, 457, 57 N. W. 953; *O'Leary v. Merchants' & Bankers' Mut. Ins. Co.*, 100 Iowa, 173, 69 N. W. 420.

of a policy may be exercised verbally, notwithstanding a provision in the policy that such waiver can be made only by a written indorsement on the policy.²⁵² Some of the early New York cases strengthen this view. Thus where it was stipulated in a policy that "The generating or evaporating within the building or contiguous thereto of any substance for a burning gas, or the use of gasoline for lighting, is prohibited, unless by special agreement indorsed on this policy," and the agents who took the risk gave oral permission to insured to put in a tank for making gasoline if it was placed fifty feet from the building, and were present when it was put in, it was held that this was a waiver which bound the company; and consent to putting in the apparatus implied consent to use the product thereof for lighting the building.²⁵³

A representation by an agent that the policy would be made to cover the change of title, and would cover the interest of one as mortgagee where it had before covered his interest as owner, was held to bind the company under the following circumstances. It was provided in the policy, that if the prop-

²⁵² *Phenix Ins. Co. v. Covey*, 41 Neb. 724, 60 N. W. 12; *Young v. Hartford Fire Ins. Co.*, 45 Iowa, 377; *Wilson v. Commercial Union Assur. Co.*, 51 S. C. 540, 29 S. E. 245 (vacancy); *Phenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S. W. 959; *Hamilton v. Home Ins. Co.*, 94 Mo. 353; *Breckinridge v. American Cent. Ins. Co.*, 87 Mo. 62; *Hilt v. Metropolitan Life Ins. Co.*, 110 Mich. 517, 68 N. W. 300; *Beebe v. Ohio Farmers' Ins. Co.*, 93 Mich. 514, 53 N. W. 818; *Smith v. German Ins. Co.*, 107 Mich. 270, 65 N. W. 236; *Radiker v. Queen Ins. Co.*, 107 Mich. 224, 65 N. W. 105; *Redstrake v. Cumberland Mut. Fire Ins. Co.*, 44 N. J. Law, 294; *O'Leary v. German American Ins. Co.*, 100 Iowa, 390, 69 N. W. 686; *Morrison v. Insurance Co. of North America*, 69 Tex. 353.

²⁵³ *Arkell v. Commerce Ins. Co.*, 7 Hun (N. Y.), 455; affirmed, on the ground that the tank was not "contiguous," 69 N. Y. 191; *Richmond v. Niagara Fire Ins. Co.*, 79 N. Y. 230.

erty insured should be sold, or if the interest of the assured was not truly stated, the policy should be void; that anything less than a distinct, specific agreement, indorsed on the policy, should not be construed as a waiver of any of its conditions; and that any person who may have procured the insurance to be taken "shall be deemed to be the agent of the assured, and not of the company under any circumstances whatever, or in any transaction relating to this insurance." The policy was obtained through H., and countersigned by him as defendant's agent. It was twice renewed; each renewal receipt, signed by defendant's president and secretary, contained this: "Not valid unless countersigned by the duly authorized agent of the company." H. countersigned each as agent, and received and forwarded the premiums to defendant. On making application for a third renewal, plaintiff notified H. that he had sold the property, and his interest was that of mortgagee. H. received the premium, gave a renewal certificate, and said he would make it all right. There was no indorsement made on the policy or other notice given. Held, that H., being the authorized agent of defendant, it was bound by his acts; they amounted to a waiver of the conditions in the policy, and plaintiff's interest as mortgagee was insured by the last renewal receipt.²⁵⁴ An insurer is chargeable with the omission of its agent authorized to issue policies, to make a promised indorsement of the existence of a chattel mortgage upon the property at the request of an insured, who is unable to read and relies upon the assurance given him and also leaves the policy in the custody of the agent.²⁵⁵

²⁵⁴ *Whited v. Germania Fire Ins. Co.*, 76 N. Y. 415, 13 Hun (N. Y.), 191; *Redstrake v. Cumberland Mut. Fire Ins. Co.*, 44 N. J. Law, 294.

²⁵⁵ *McGuire v. Hartford Fire Ins. Co.*, 7 App. Div. 575, 40 N. Y. Supp. 300; *McCabe v. Aetna Ins. Co.* (N. D.), 81 N. W. 426; *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551, 4 L. R. A. 848.

SAME—THE BETTER RULE.

§ 107. But the better rule is that an oral waiver by a local agent after the delivery of the policy is not binding upon the insurer if the policy requires such waiver to be in writing.

Where a policy permits an agent to exercise a specified authority, but prescribes that the principal shall not be bound unless the execution of the power should be evidenced by a written indorsement upon the policy, the condition is of the essence of the authority, and the consent or act of the agent not so indorsed is void.²⁵⁶ Speaking on this question the supreme court of Wisconsin recently said: "We know of no good reason that should cause us to declare such a covenant or stipulation void. It is a plain and exact stipulation of the contract upon which the minds of the parties met, and is as binding upon the assured as any stipulation in the policy. When the assured sought to have the local agent waive the forfeiture, he knew by the terms of his policy that the agent had no power or authority to waive it unless it was indorsed on the policy in writing. This provision was a clear restriction and limitation of his power. It was the fault of the insured that he failed or omitted to have the waiver indorsed. The courts cannot relieve a party from his neglect to abide by the stipulations of his contract, nor make a new contract for him different from what he made himself."²⁵⁷

²⁵⁶ *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 10; *Marvin v. Universal Life Ins. Co.*, 85 N. Y. 278; *Quinlan v. Providence Wash. Ins. Co.*, 133 N. Y. 360.

²⁵⁷ *Oshkosh Match Works v. Manchester Fire Assur. Co.*, 92 Wis. 510, 66 N. W. 525; *Carey v. German American Ins. Co.*, 84 Wis. 80, 54 N. W. 20; *Egan v. Westchester Ins. Co.*, 28 Or. 289, 42 Pac. 611; *East Texas Fire Ins. Co. v. Kempner*, 87 Tex. 229; *Northwestern Nat. Ins. Co. v. Mize (Tex.)*, 34 S. W. 670; *O'Leary v. Merchants' & Bankers' Mut. Ins. Co.*, 100 Iowa, 173, 69 N. W. 420; *Gould v. Dwelling House Ins. Co.*, 90 Mich. 302, 51 N. W. 455.

SAME — STANDARD POLICIES.

§ 108. No agent can waive any of the provisions of a standard policy except in the manner therein provided.

An agent cannot waive any of the conditions of a standard policy, nor the manner of waiving therein required. And where the standard policy provides "no officer * * * shall have power or be deemed or held to have waived any provision or condition unless such waiver, if any, be written upon or attached hereto," it prohibits a waiver in any other manner.²⁵⁸

COLLECTION OF PREMIUMS AND RENEWALS.

§ 109. An agent empowered to issue policies has, in the absence of some known limitation on his power in that particular, authority to collect and receive premiums and renewals, and to give reasonable credit therefor.

It would seem well settled by the great weight of authority, that, in view of the general customs and usage of insurance agents, at least in the case of stock companies, a person dealing with an agent clothed with power to issue policies, has a right to assume, in the absence of notice to the contrary, that the agent has authority to accept the payment of premiums and to exercise his judgment as to mode of payment, and to give a reasonable credit therefor. Thus an agent may accept checks or notes;²⁵⁹ and may interpret the

²⁵⁸ *Straker v. Phoenix Ins. Co.*, 101 Wis. 413, 77 N. W. 753; *Anderson v. Manchester Fire Assur. Co.*, 59 Minn. 189; *Wadhams v. Western Assur. Co.*, 117 Mich. 514, 76 N. W. 6; *Hicks v. British America Assur. Co.*, 62 N. Y. 284, 48 L. R. A. 425; *Quinlan v. Providence Wash. Ins. Co.*, 133 N. Y. 356.

²⁵⁹ *Franklin Ins. Co. v. Colt*, 20 Wall. (U. S.) 560; *Jones v. New York Life Ins. Co.*, 168 Mass. 245; *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390; *Miller v. Brooklyn Life Ins. Co.*, 12 Wall. (U. S.) 285. Or may agree that payment be deferred, *Southern Life Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 607; *Slobodisky v. Phenix Ins.*

contract as to the day the premium falls due so as to bind the company.²⁶⁰ He may extend credit to the insured for the payment of the premium and charge himself with the same;²⁶¹ even although he retains the renewal receipt at the request of the insured;²⁶² and the insurer will be bound although the property insured be destroyed before the term of credit has expired.²⁶³ He may bind the insurer by his acts and declarations inducing a member of a mutual benefit association to believe that the time for payment of assessments would be extended as on former occasions, even though the manager of the association has told assured that such assessments were overdue.²⁶⁴ A mere collector for a life insurance company has no implied authority to waive the requirement of a

Co., 53 Neb. 816, 74 N. W. 271; *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117; *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 20 Barb. (N. Y.) 468; *Sheldon v. Connecticut Mut. Life Ins. Co.*, 25 Conn. 207; *Chickering v. Globe Mut. Life Ins. Co.*, 116 Mass. 321; *Home Ins. Co. v. Curtis*, 32 Mich. 402. But see *Hambleton v. Home Ins. Co.*, 6 Biss. 91, Fed. Cas. No. 5,972. But the agent cannot bind the insurer by an agreement to give credit for the premium contrary to the terms of the policy, in the absence of some usage or special instructions to the contrary. *Wilkins v. State Ins. Co.*, 43 Minn. 177; *Carter v. Cotton States Life Ins. Co.*, 56 Ga. 237; *Globe Mut. Life Ins. Co. v. Wolff*, 95 U. S. 329; *Cyrenius v. Mutual Life Ins. Co.*, 18 App. Div. 599, 46 N. Y. Supp. 549; *Pottsville Mut. Fire Ins. Co. v. Minnequa Springs Imp. Co.*, 100 Pa. St. 137.

²⁶⁰ *Campbell v. International Life Assur. Soc.*, 4 Bosw. (N. Y.) 298. See ante, note 13.

²⁶¹ *Mechanics' & Traders' Ins. Co. v. Mutual Real Estate & Bldg. Ass'n*, 98 Ga. 262, 25 S. E. 457; *Farragut Fire Ins. Co. v. Shepley* (Minn.), 80 N. W. 976.

²⁶² *Tennant v. Travellers' Ins. Co.*, 31 Fed. 322.

²⁶³ *Squier v. Hanover Fire Ins. Co.*, 18 App. Div. 575, 46 N. Y. Supp. 30.

²⁶⁴ *Sweetser v. Odd Fellows Mut. Aid Ass'n*, 117 Ind. 97; *Zell v. Herman Farmers' Mut. Ins. Co.*, 75 Wis. 521; *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234; *Wyman v. Phoenix Mut. Life Ins. Co.*, 119 N. Y. 274.

policy as to the time of the payment of premiums.²⁶⁵ An agent cannot, by giving an ante-dated receipt for a premium, revive a policy which has become forfeited for non-payment according to the terms of the contract.²⁶⁶ He has no implied authority to accept payment of premium notes received by him and transmitted to the company and not in his possession at the time of payment.²⁶⁷

STIPULATIONS IN POLICY AGAINST GIVING CREDIT.

§ 110. Many policies in terms deny to an agent the right to give credit for premiums. Such stipulations in a policy are usually held valid; but being inserted by the insurer for its own benefit, they may be waived by it.

Any limitation on the power of an agent to collect premiums or give credit therefor when brought to the knowledge of the assured is effectual. The insurer can hedge the agent round with restrictions and limitations, and may waive the same by an opposite course of dealing. Thus, the company may by its conduct estop itself from asserting the provision of its policy forbidding its agents to accept anything but cash in payment of premiums.^{267a}

In *Wilkins v. State Ins. Co.*,²⁶⁸ the agent of the defendant whose general duties were to solicit insurance, fill up blanks in printed policies already signed by the general officers of the company and left in his possession, countersign and deliver the same, and collect and remit the premiums, had assumed to waive immediate payment and had delivered the policy in suit

²⁶⁵ *Bryan v. National Life Ins. Ass'n*, 21 R. I. 149, 42 Atl. 513. See note 259.

²⁶⁶ *Diboll v. Aetna Life Ins. Co.*, 32 La. Ann. 179.

²⁶⁷ *Long Creek Bldg. Ass'n v. State Ins. Co.*, 29 Or. 569, 46 Pac. 366.

^{267a} *Godfrey v. New York Life Ins. Co.*, 70 Minn. 224, 73 N. W. 1.

²⁶⁸ 43 Minn. 177; *Jackson v. Mutual Ben. Life Ins. Co.*, 79 Minn. 44, 81 N. W. 545, 82 N. W. 366.

to the plaintiff, giving the latter a temporary credit for the premium. The premium had not been paid before the fire occurred. The court said: "The question is whether the company was bound by the act of the agent in waiving immediate payment of the premium, and giving plaintiff credit. The policy contains a provision that 'no insurance shall be considered as binding until actual payment of the premium.'

* * * It is the undoubted right of the company, as in the case of any principal, to impose a limitation upon the authority of its agents. And it is as elementary as it is reasonable that if an agent exceeds his actual authority, and the person dealing with him has notice of that fact, the principal is not bound; and it is upon this proposition that defendant chiefly relies. There are two provisions in the policy to which he refers in support of his contention. The first is that 'no officer, agent, or representative of the company, shall be held to have waived any of the terms or conditions of this policy unless such waiver shall be indorsed thereon.'

* * * This provision will not support defendant's contention, but the other or second one does. It is as follows: 'this policy is made and accepted upon the above express terms, and no part of this contract can be waived except in writing signed by the secretary of the company.' The words 'policy' and 'contract' are evidently here used as synonymous, and the latter clause clearly means that none of the terms of the policy can be waived by anyone except the secretary. Conceding that this would not prevent the company itself, through its board of directors, or other body representing it in its corporate capacity, from waiving any of the terms or conditions of the policy, yet it is a plain declaration that no representative of the company but the secretary can do so, and hence that no local agent can do it. This, being in the policy itself, was notice to plaintiff that this agent * * *

had no authority to waive the condition that no insurance would be binding until payment of the premium. It is no answer to say that he did not read the policy, and hence did not know what it contained. He was bound to know this; and, by accepting the policy, he is estopped from setting up powers in the agent in opposition to the express limitations contained in it."

But a general agent who collects enough cash on the first premium to pay the part thereof which is due to the insurer, may extend credit for the balance of the premium which goes to him by way of commission for effecting the insurance; and a policy delivered under such conditions is binding on the insurer, though the terms of the policy require the first premium to be paid in cash before the delivery of the policy.^{268a}

If the policy provides that payment of the premium must be made on or before the day it falls due, and every renewal certificate contains notice to the effect that no agent is authorized to receive any premium after it becomes due without special permission from the company's officers, it is beyond the power of local and limited agents to nullify these provisions and bind their principal by a course of dealing with policy holders in violation thereof.²⁶⁹ Thus where the policy stipulates that it will be forfeited if the renewal premium is not paid when it becomes due, and an indorsement is that "Agents of this company will receive premiums when due, but are not authorized in any case to make, alter or discharge contracts," the acceptance of a renewal premium by an agent after it becomes due, does not bind the company, unless it ratifies his act.²⁷⁰

^{268a} John Hancock Mut. Life Ins. Co. v. Schlink, 175 Ill. 285.

²⁶⁹ Lewis v. Phoenix Mut. Life Ins. Co., 44 Conn. 72.

²⁷⁰ Franklin Life Ins. Co. v. Sefton, 53 Ind. 380; Koelges v. Guardian Life Ins. Co., 2 Lans. (N. Y.) 480; Bouton v. American Mut. Life

Contra — Waiver of Stipulation against Credit.

Some courts, acting upon the theory that the collection of premiums and renewals are within the general scope of the agent's authority, have held that the provisions of the policy denying agents the right to deliver or renew policies without prepayment, may be effectually waived by the agent. Thus in New York an insurer is presumed to know and is bound by the terms of a contract entered into by its agent providing for the payment of the first premium by note, notwithstanding a provision in the policy that it shall not take effect until the first premium is paid.²⁷¹ And in Nebraska and Arkansas the unconditional delivery of a policy without requiring payment of the premium in cash, by a general agent of the company having authority to make terms for insurance, countersign and deliver policies, and collect premiums, operates as a waiver of a provision requiring cash payment of premiums.²⁷² Where application for insurance is made to an agent without any company being designated, and such agent writes a policy providing that there should be no liability until the premium is paid, and that "it is expressly covenanted by the parties hereto that no officer, agent or representative of the company shall be held to have waived any

Ins. Co., 25 Conn. 542; *Ryan v. World Mut. Life Ins. Co.*, 41 Conn. 168; *Acey v. Fernie*, 7 Mees. & W. 151; *Catoir v. American Life Insurance & Trust Co.*, 33 N. J. Law, 487; *Wall v. Home Ins. Co.*, 8 Bosw. (N. Y.) 597.

²⁷¹ *Stewart v. Union Mut. Life Ins. Co.*, 155 N. Y. 257, 27 Ins. Law J. 698, 49 N. E. 876; *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117. But see *Cyrenius v. Mutual Life Ins. Co.*, 18 App. Div. 599, 46 N. Y. Supp. 549; *Southern Life Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 17 Am. St. Rep. 233, and note.

²⁷² *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562, 36 S. W. 1051; *Pythian Life Ass'n v. Preston*, 47 Neb. 374, 66 N. W. 445.

of the terms or conditions of this policy, unless such waiver shall be indorsed hereon in writing," the question of agency is not affected because the principal was undisclosed; and the agent has authority to bind the company by a parol agreement extending the time for making payment of the premium, the limitation quoted not being on his power, but merely relating to the manner in which the exercise of it should be evidenced.²⁷³ The recital in a policy of life insurance issued by a non-resident company, that "the first premium is to be paid in advance," is not notice to the insured that the general agent of the company in the state has no authority to accept a note for the premium, where he furnishes a printed blank on which to execute the note and accepts the note executed thereon, and the policy and receipt are thereupon delivered to the applicant, though the policy provides that "no person except the president or secretary is authorized to make, alter, or discharge contracts, or to waive forfeitures."²⁷⁴

MANNER OF PAYMENT OF PREMIUM.

§ 111. An agent cannot bind the company by taking anything but money in payment of premiums, except in cases where general custom or his course of dealing, with the knowledge of his principal, warrants some other inference.

It is an elementary principle, applicable alike to all cases of agency, that whatever an agent does can be done only in the way usual in the line of business in which he is acting. There is an implication to this effect arising from the nature of his

²⁷³ *Young v. Hartford Fire Ins. Co.*, 45 Iowa, 377; *Mississippi Valley Ins. Co. v. Neyland*, 9 Bush (Ky.), 430; *Sheldon v. Connecticut Mut. Life Ins. Co.*, 25 Conn. 207; *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Bowman v. Agricultural Ins. Co.*, 59 N. Y. 521.

²⁷⁴ *Washington Life Ins. Co. v. Menefee's Ex'r* (Ky.), 53 S. W. 260; *Connecticut Ind. Ass'n v. Grogan's Adm'r* (Ky.), 52 S. W. 959.

employment, and it is as effectual as if it had been expressed in its most formal terms. Thus the taking of a horse by an agent of an insurance company to pay the premium of a policy is *ultra vires*, and a fraud as respects the company. No valid contract could arise from such a transaction.²⁷⁵ Nor is an insurance company bound to approve an application sent it by its soliciting agent even though he had already accepted livery hire as payment for the premium, unless the agent had either actual or apparent right to contract for livery service at the expense of the insurer.²⁷⁶ In a Georgia case the policy provided that the premiums were to be paid annually—\$100 by a loan and \$107.30 in cash, and was to be void if payment was not made according to its terms. It was expressed in the application that the policy should not be binding until the first premium was received by the company during the assured's life-time and good health. Defendant's agent contracted with insured that the premium for the first year should be paid in services to be rendered by the latter as medical examiner for the company. If such services exceeded in value the amount of the first year's premium, a credit was to be given for the excess on the premium for the second year. The death of insured occurred during the first year. The fees for his services did not amount to as much as the premium. Held, that the act of the agent was in excess of his authority and there could be no recovery.²⁷⁷

²⁷⁵ Hoffman v. John Hancock Mut. Life Ins. Co., 92 U. S. 161; Cyrenius v. Mutual Life Ins. Co., 18 App. Div. 599, 46 N. Y. Supp. 549; Crawford County Mut. Ins. Co. v. Cochran, 88 Pa. St. 230; ante, note 30. But see Van Werden v. Equitable Life Assur. Soc., 99 Iowa, 621, 68 N. W. 892; John Hancock Mut. Life Ins. Co. v. Schlink, 175 Ill. 284.

²⁷⁶ Winchell v. Iowa State Ins. Co., 103 Iowa, 189, 72 N. W. 503.

²⁷⁷ Carter v. Cotton States Life Ins. Co., 56 Ga. 237; Anchor Life Ins. Co. v. Pease, 44 How. Pr. (N. Y.) 385, 4 Bigelow, Life & Acc. Ins. Rep. 215.

But an agreement made by a local agent and approved by the general agent of the territory in which it was made, that fees due the insured for services to the company should be applied in payment of premiums on his policy, constitute a waiver of the conditions of the policy regarding payment.²⁷⁸ The insurer is not concerned in the arrangement made between the agent and the insured regarding payment of that part of the premium which goes to the agent in payment of his commission.^{278a}

Agent Taking Note Payable to Himself.

An insurance company is chargeable with the fraud of its general manager and state agent in procuring a renewal of a premium note payable to himself upon a false promise that he would return the original which had in fact been assigned to an innocent holder, where it had furnished him blank receipts to fill out when premium notes were taken, and issued a policy to the maker without having received a cash payment, and by other officers assuming to act for the company induced the maker to believe the agent had authority to take and renew premium notes.²⁷⁹

POWER OF AGENT TO WAIVE PROOFS OF LOSS.²⁸⁰

§ 112. A general agent of the insurer, or its adjuster, can waive proofs of loss; and service of proofs of loss on them is service on the insurer.

²⁷⁸ Willcuts v. Northwestern Mut. Life Ins. Co., 81 Ind. 300; Van Werden v. Equitable Life Assur. Soc., 99 Iowa, 621, 68 N. W. 892.

^{278a} John Hancock Mut. Life Ins. Co. v. Schlink, 175 Ill. 284.

²⁷⁹ First Nat. Bank of Dubuque v. Getz, 96 Iowa, 139, 64 N. W. 799; Godfrey v. New York Life Ins. Co., 70 Minn. 224, 73 N. W. 1; New York Life Ins. Co. v. Rohrbough, 2 Willson Civ. Cas. Ct. App. (Tex.) 167. Compare Jackson v. Mutual Ben. Life Ins. Co., 79 Minn. 44, 81 N. W. 545, 82 N. W. 366.

²⁸⁰ See post, c. 14, "Waiver of Notice and Proofs of Loss."

A special or local insurance agent cannot waive proofs of loss. Service of proofs of loss on them is not sufficient.

An agent with power to waive proofs of loss can waive the provisions of the policy requiring such waiver to be in writing and indorsed on the policy, except where the policy is a standard policy.

CLERKS AND SUB-AGENTS.

§ 113. General, special and local agents of insurance companies have as an incident to their powers the right to employ clerks and sub-agents to perform, or assist them in performing, the detail and ministerial portion of their duties to their principal.

The powers which may be delegated to clerks and sub-agents must be determined by the nature of the business required to be done by the primary agent to accomplish the purposes of the agency, and the customs of the locality.

Insurance companies are presumed to know, when they employ agents, that according to the general course of business, the agents will have clerks and sub-agents to assist them in the detail and clerical work of the agency, and that an agent could not in very many cases transact the business intrusted to his care alone and unaided. It being therefore reasonable and customary for agents to employ others in doing the work, it is just and reasonable that the principal should be held responsible for the acts of the agent's employes and sub-agents. True, the general rule is, that agents cannot delegate their power without express authority from their principals; but in many cases such authority may be implied, as where it is necessary to accomplish the purposes of the agency, or where it is the ordinary custom so to do, or where it is understood by the parties to be the mode in which the agency might or could be carried on. All services are not of such a personal nature as to come within the rule *delegatus non potest delegare*. Generally speaking, therefore, agents of insurance companies,

authorized to contract for risks, collect and receive premiums, and deliver policies, may confer upon their subordinates the same powers.²⁸¹ An insurance company which knows that a clerk in the office of its general agent passes on applications and signs the agent's name, and is in the habit of acting for him in such matters, is responsible for the acts of such clerk within the scope of the agent's authority in connection with the business.²⁸²

A provision in a policy that "only such persons as shall hold the commission of this company" shall be considered as its agents in any transaction relating to the insurance, will not prevent the employment by the authorized agents of such company, of clerks who may act on behalf of such agents, and who stand in the same relation to the principal as the agents, and can bind the company within the proper scope of their employment.²⁸³ Though an agent cannot delegate his authority, he may employ clerks and sub-agents, whose acts, done in his name and recognized by him, either specially or

²⁸¹ *Deitz v. Providence Wash. Ins. Co.*, 33 W. Va. 526, 31 W. Va. 851; *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117; *Bennett v. Council Bluffs Ins. Co.*, 70 Iowa, 600; *Goode v. Georgia Home Ins. Co.*, 92 Va. 392, 30 L. R. A. 842; *Arff v. Star Fire Ins. Co.*, 125 N. Y. 57; *Steele v. German Ins. Co.*, 93 Mich. 81; *Michigan F. & M. Ins. Co. v. Wich*, 8 Colo. App. 409, 46 Pac. 687; *Kuney v. Amazon Ins. Co.*, 36 Hun (N. Y.), 66; *Runkle v. Citizens' Ins. Co.*, 6 Fed. 143 (distinguishing powers which can from those which cannot be delegated); *Krumm v. Jefferson Fire Ins. Co.*, 40 Ohio St. 225.

²⁸² *Fitzpaterick v. Hartford Life & Annuity Ins. Co.*, 56 Conn. 116; *German Fire Ins. Co. v. Columbia Encaustic Tile Co.*, 15 Ind. App. 623, 43 N. E. 41.

²⁸³ *Arff v. Star Fire Ins. Co.*, 125 N. Y. 57, 10 L. R. A. 609; *International Trust Co. v. Norwich Union Fire Ins. Soc.*, 71 Fed. 81, 17 C. C. A. 608; *Bennett v. Council Bluffs Ins. Co.*, 70 Iowa, 600, 31 N. W. 948; *Waldman v. North British & Mercantile Ins. Co.*, 91 Ala. 170. And notice to such clerk is notice to the company. *Phoenix Ins. Co. v. Ward*, 7 Tex. Civ. App. 13, 26 S. W. 763; *Bennett v. Council Bluffs Ins. Co.*, *supra*.

according to his usual method of dealing with them, will be considered as his acts and will bind his principal.²⁸⁴ Where an insurance agent permits his sub-agent to receive premiums from and deliver policies to the insured, the acts of the sub-agent are regarded as the acts of the agent, and persons dealing with the sub-agent have a right to judge of the extent of his authority by the nature of the business intrusted to him; and the waiver by such sub-agent of a condition of a policy is the waiver of the agent, and of the company he represents.²⁸⁵ The insurer's assent to an assignment of the policy is properly evidenced by the signature of sub-agents as "agents," although the fact of their sub-agency is not made apparent in the writing.²⁸⁶

One employed by the commissioned agent of an insurance company to solicit risks, make surveys, collect premiums and deliver policies, and who receives as compensation a share of the earnings of the business, and is accustomed to fix rates, which are accepted and approved by the agent with the knowledge of the officers of the company, is an agent of the latter, and his acts bind it.²⁸⁷ A. gave B. power of attorney to underwrite any policy not exceeding one hundred pounds and to subscribe it in his name, and to settle and adjust losses, etc. Held, that although B. cannot delegate his whole authority to another, yet, having signed a slip for a policy,

²⁸⁴ *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252; *International Trust Co. v. Norwich Union Fire Ins. Soc.*, 71 Fed. 81, 17 C. C. A. 608.

²⁸⁵ *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472; *Deitz v. Providence Wash. Ins. Co.*, 33 W. Va. 526, 31 W. Va. 851. See contra *Waldman v. North British & Mercantile Ins. Co.*, 91 Ala. 170, 24 Am. St. Rep. 883.

²⁸⁶ *Chauncy v. German American Ins. Co.*, 60 N. H. 428.

²⁸⁷ *Davis v. Lamar Ins. Co.*, 18 Hun (N. Y.), 230; *Van Schoick v. Niagara Fire Ins. Co.*, 68 N. Y. 434; *Chase v. People's Fire Ins. Co.*, 14 Hun (N. Y.), 456; *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117.

the signature of his clerk for him and in his absence, to a policy written in pursuance of the slip, is a good execution of the power, being only a ministerial act, which might be done by another by his authority.²⁸⁸ But an agent's clerk who has no authority to contract for or issue policies, cannot waive a provision avoiding a policy if the insured property becomes encumbered by a chattel mortgage.²⁸⁹

DELEGATION OF POWER.

§ 114. Authority implying the exercise of judgment or discretion cannot, in the absence of a known usage, or unless justified by the necessities of the case, be delegated by the agent to another without the consent of the principal.

The adjusting agent of an insurance company has no power to delegate his authority, and the company is not bound by the acts of a sub-agent appointed by him, in the absence of a showing that he customarily delegated his authority to others with the consent of the company.²⁹¹ Nor can the authority conferred upon an insurance agent to allow extensions of time on premium notes, be delegated without consent of the company.²⁹² The directors of a mutual insurance company

²⁸⁸ *Mason v. Joseph*, 1 Smith, J. P. Eng. 406.

²⁸⁹ *German-American Ins. Co. v. Humphrey*, 62 Ark. 348, 35 S. W. 428, 25 Ins. Law J. 658; *Dwelling-House Ins. Co. v. Snyder*, 59 N. J. Law, 18, 34 Atl. 931.

²⁹⁰ *Brown v. Railway Passenger Assur. Co.*, 45 Mo. 221; *Farmers' Mut. Fire Ins. Co. v. Chase*, 56 N. H. 341; *McClure v. Mississippi Valley Ins. Co.*, 4 Mo. App. 148; *Runkle v. Citizens' Ins. Co.*, 6 Fed. 143.

²⁹¹ *Monroe v. British & F. M. Ins. Co. (C. C. A.)*, 52 Fed. 777; *Albers v. Phoenix Ins. Co.*, 68 Mo. App. 543; *Ruthven v. American Fire Ins. Co.*, 92 Iowa, 316, 60 N. W. 663.

²⁹² *Home Fire Ins. Co. v. Garbacz*, 48 Neb. 827, 67 N. W. 864.

cannot delegate a right conferred on them to represent absent members and vote for them at meetings.²⁹³

SAME — EVIDENCE OF AUTHORITY OF SUB-AGENT.

§ 115. The one asserting power in a sub-agent has the burden of proving the existence and extent of the power.

One who desires to avail himself of the acts of another whom he claims was a sub-agent, must prove the appointment of the sub-agent by the agent, and the power of the latter to make such an appointment.²⁹⁴

TERMINATION OF AGENCY.

§ 116. The authority of an agent to represent an insurer may be terminated by the terms of the appointment, by the act of the parties, or by operation of law.

Persons who deal with an agent in the particular business with which he was intrusted may rely upon the continuance of his authority until informed of its revocation, and are not affected by secret or special agreement limiting or terminating the agent's authority.

Statutory agencies can only be revoked in the manner prescribed by statute, and after they have served the purpose intended by the law.

The revocation or cessation of an agent's authority terminates the authority of all those who derived their power through him.

Where an agency is created for a given or definite period, or until the happening of a particular event, the expiration of that period or the happening of that event operates to terminate the agency. And it may be terminated at any time, unless otherwise stipulated in the contract of employment, by revocation of authority by the principal, or by the renuncia-

²⁹³ *Farmers' Loan & Trust Co. v. Aberle*, 18 Misc. Rep. 257, 41 N. Y. Supp. 638.

²⁹⁴ *American Underwriter's Ass'n v. George*, 97 Pa. St. 238; ante, § 77.

tion of his agency by the agent. It may always be terminated by the mutual consent of the parties, subject to conditions hereinafter mentioned. Parol revocation or renunciation is sufficient.²⁹⁵

One who is insured in a mutual insurance company accepts the policy with all the conditions and limitations contained in the charter, by-laws, and policy, and is bound by provisions therein denying to agents any powers after the delivery of the policy.²⁹⁶ Where a firm or corporation which has appointed an agent is dissolved, or goes into bankruptcy, the agency is thereby revoked.²⁹⁷ The agency ceases when the company goes out of business.²⁹⁸ Authority to two persons to act as "agent," terminates with the death or insanity of either;²⁹⁹ but a contract authorizing a firm of insurance brokers to procure and keep alive fire insurance for a business

²⁹⁵ *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 198; *Gundlach v. Fischer*, 59 Ill. 172; *Oregon & W. Mortg. Sav. Bank Co. v. American Mortg. Co.*, 35 Fed. 22; *Story, Agency*, §§ 463-481. "It may have been called into being for the express purpose of performing a single act or series of acts, and, these being performed, the agency would be terminated by the accomplishment of that for which it was created. * * * So, subsequent changes in the conditions or relation of the parties may render the continuance of the agency inconsistent or impossible, and it will be terminated by operation of law." *Mechem, Agency*, § 199 et seq.

²⁹⁶ *Bourgeois v. Mutual Fire Ins. Co.*, 86 Wis. 402, 57 N. W. 39.

²⁹⁷ *Rowe v. Rand*, 111 Ind. 206; *Schlater v. Winpenny*, 75 Pa. St. 321; *Montross v. Roger Williams Ins. Co.*, 49 Mich. 477; *Whitworth v. Ballard*, 56 Ind. 279.

²⁹⁸ *North Carolina State Life Ins. Co. v. Williams*, 91 N. C. 69.

²⁹⁹ *Hartford Fire Ins. Co. v. Wilcox*, 57 Ill. 180; *Martine v. International Life Assur. Soc.*, 62 Barb. (N. Y.) 181, 53 N. Y. 339; *Salisbury v. Brisbane*, 61 N. Y. 617; *Rowe v. Rand*, 111 Ind. 206. As to the effect upon agency of war between the country of the principal and that of the agent, see *New York Life Ins. Co. v. Davis*, 95 U. S. 425, and *New York Life Ins. Co. v. Statham*, 93 U. S. 24, holding that it dissolves the relation; and *Robinson v. International Life Assur. Soc.*, 42 N. Y. 54; *Sands v. New York Life Ins. Co.*, 50 N. Y. 626, and

firm, and providing that any change in the membership of the firms, or either of them, should "not in any wise release either of said firms or any of the present members" therefrom, is not terminated by the retirement of one of the brokers from the firm.³⁰⁰

Secret Revocation.

The presumption is that an existing agency will continue. After an insurance company has appointed an agent in a particular business, parties dealing with him in that business have a right to rely upon the continuance of his authority, until they are in some way informed of its revocation. It cannot secretly withdraw its agency from agents who have issued a policy, so as to relieve itself from their subsequent acts in connection with the policy. Unless revocation of the agent's authority be brought home to the party who deals with him in reliance upon a known pre-existing authority, the principal will be bound by the dealings of the agent within the scope of such authority to the same extent as if the revocation had not been attempted. But a revocation is binding upon all to whom it is communicated. If known only to the principal and agent, it would only be effectual between them.³⁰¹

Statutory Agency.

Where a statute requires each foreign insurance company doing business within the state to appoint a resident agent

Manhattan Life Ins. Co. v. Warwick, 20 Grat. (Va.) 614, maintaining the opposite doctrine.

³⁰⁰ *Tannebaum v. Rosenthal*, 44 App. Div. 431, 60 N. Y. Supp. 1092.

³⁰¹ *Southern Life Ins. Co. v. McCain*, 96 U. S. 84; *Montross v. Roger Williams Ins. Co.*, 49 Mich. 477; *McNeilly v. Continental Life Ins. Co.*, 66 N. Y. 23; *Springfield F. & M. Ins. Co. v. Davis* (Ky.), 37 S. W. 582; ante, notes 31, 32.

within that state upon whom process might be served, a company having appointed such an agent pursuant to the statutory requirement can only revoke his authority upon the appointment of another.³⁰² And where the statute provides that "whoever solicits insurance on behalf of an insurance company," etc., shall be deemed the agent of the insurer, and that service of the summons may be made upon any agent of the insurer, the agency thus created by the statute cannot be terminated by the insured, and does not cease to exist by lapse of time; but is continuous, at least for the purpose of enabling the court to acquire jurisdiction over the insurer in a suit on a policy issued by such agent.³⁰³

Termination of the Powers of Sub-agent.

The termination of the authority of an agent brings to an end the powers of all sub-agents and clerks appointed by him and who derive their power through him, and this rule applies even though the agent was given the right of substitution.³⁰⁴ Where an agent has appointed a sub-agent or substitute without direct authority so to do, and for his own convenience merely, the death of the agent annuls the authority of the sub-agent or substitute.³⁰⁵

ADJUSTERS.

§ 117. An adjuster is an agent of the insurer clothed with authority to represent it in investigating the origin, cause, and extent of a loss, and in all matters relating to the settlement and adjustment of a loss.

³⁰² *Gibson v. Manufacturers' F. & M. Ins. Co.*, 144 Mass. 81; *Michael v. Mutual Ins. Co.*, 10 La. Ann. 737.

³⁰³ *Fred Miller Brewing Co. v. Council Bluffs Ins. Co.*, 95 Iowa, 31, 63 N. W. 566.

³⁰⁴ *Lehigh Coal & Navigation Co. v. Mohr*, 83 Pa. St. 228.

³⁰⁵ *Jackson Ins. Co. v. Partee*, 9 Heisk. (Tenn.) 296; *Mechem, Agency*, §§ 252, 262, 270; 2 *Livermore, Agency*, § 307; *Martine v. International Life Assur. Soc.*, 62 Barb. (N. Y.) 181; *Guthrie v. Armstrong*, 1 Dowl. & R. 248.

He can by his acts or declarations waive the conditions of the policy requiring insured to furnish proofs of loss.

He cannot delegate his authority.

The business of an adjusting agent of an insurance company is to ascertain the nature and amount and circumstances of a loss, and agree with the insured on a settlement when that can be done. It is the adjuster who determines the amount of a claim, as a claim against the company. *Prima facie*, his powers are co-extensive with the business intrusted to his care. He has ordinarily the power to act in all matters pertaining to the adjustment of the loss, and to deal with the loss, and make a settlement with the insured. And if, in so doing, he exceeds his authority, that is a matter exclusively within the knowledge of the insurers, and they must prove it.³⁰⁶ Instructions to a sub-agent by a general adjuster to "see about a loss and look it over," give him authority to adjust a loss, and to waive breaches of the conditions of the policy.³⁰⁷ But an agent who has authority to adjust a particular loss cannot, by virtue thereof, adjust a different loss, and whatever he may have asserted with reference to such different loss cannot bind his principal.³⁰⁸ Special authority to an agent to adjust a particular loss or damage does not confer authority to bind the company by a promise to pay such loss or damage, where the policy provides that adjustment shall be made without reference to the

³⁰⁶ Anderson's Law Dict.; First Nat. Bank of Devil's Lake v. Manchester Fire Assur. Co., 64 Minn. 100; First Nat. Bank of Devil's Lake v. Lancashire Ins. Co., 65 Minn. 462; Ramsey v. Philadelphia Underwriters' Ass'n, 71 Mo. App. 380; Aetna Ins. Co. v. Shryer, 85 Ind. 362; Aetna Ins. Co. v. Maguire, 51 Ill. 342; Enos v. St. Paul F. & M. Ins. Co., 4 S. D. 639, 57 N. W. 919.

³⁰⁷ Swain v. Agricultural Ins. Co., 37 Minn. 390.

³⁰⁸ Hartford Fire Ins. Co. v. Smith, 3 Colo. 422; Monroe v. British & F. M. Ins. Co. (C. C. A.), 52 Fed. 777.

other terms and conditions of the contract.³⁰⁹ An authority to adjust a loss occurring on the British coast cannot be presumed from the fact that the Boston agents of a British company were authorized to issue policies, receive the premiums, and represent the insurer in legal proceedings in Massachusetts.³¹⁰

Statutory Regulation.

The act of an adjuster in attending to his duties in connection with a loss, is not "transacting insurance business" within the meaning of a statute regulating the transaction of insurance business.³¹¹

A professional adjuster, employed by different companies as they require his services, has a right to follow his calling in any state where his employment takes him. That is a right guaranteed him by the constitution of the United States, and the fact that he goes to a particular state to adjust a loss for an unlicensed foreign company does not make him its agent so as to subject him to a penalty within the terms of a statute regulating the business and agents of foreign insurance companies. Any law abridging the agent's rights in these particulars would be void.³¹²

Waiver of Proofs of Loss by Adjuster.

The adjuster of an insurance company may by his acts or declarations waive the provisions of a policy requiring the

³⁰⁹ *Queen Ins. Co. v. Young*, 86 Ala. 424.

³¹⁰ *Monroe v. British & F. M. Ins. Co.*, 5 U. S. App. 179, 52 Fed. 777, 3 C. C. A. 280.

³¹¹ *People v. Gilbert*, 44 Hun (N. Y.), 522.

³¹² *French v. People*, 6 Colo. App. 311, 40 Pac. 463, 24 Ins. Law J. 678. See, also, *Weed v. London & L. Fire Ins. Co.*, 116 N. Y. 106; *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222.

service by the insured of notice and proofs of loss.³¹³ Power to "adjust" a loss under a policy includes the power to waive formal proofs of loss.³¹⁴ A limitation on the power of an agent to waive conditions in a policy of insurance, does not operate to limit the usual powers of an adjuster after the policy has become a demand;³¹⁵ and the provisions of a policy that only a specific agreement indorsed thereon shall be construed as a waiver of any condition, and that the agent of the insuring company has no authority to waive any condition, do not prevent the company's adjuster from waiving a condition requiring insured to furnish proof of loss;³¹⁶ e. g. by refusing to pay a loss to the assignee of the policy on the ground that a mortgage held by the assignee was unauthorized,³¹⁷ or by taking written sworn examinations of the assured, requiring him to furnish duplicate bills of goods, referring to the examinations and bills of goods as proofs of loss, stating to the assured that nothing more is required and offering to pay portions of the loss.³¹⁸ But an offer by an adjuster to compromise is not a waiver of any rights.³¹⁹

³¹³ *Dibrell v. Georgia Home Ins. Co.*, 110 N. C. 193; *German Ins. Co. v. Gray*, 43 Kan. 497; *McCollum v. Liverpool, L. & G. Ins. Co.*, 67 Mo. App. 66; *Brown v. State Ins. Co.*, 74 Iowa, 428, 38 N. W. 135; *Rockford Ins. Co. v. Williams*, 56 Ill. App. 338; *Hanover Fire Ins. Co. v. Gustin*, 40 Neb. 828, 59 N. W. 375; *Faust v. American Fire Ins. Co.*, 91 Wis. 158, 64 N. W. 883.

³¹⁴ *Ruthven v. American Fire Ins. Co.*, 102 Iowa, 550, 71 N. W. 574.

³¹⁵ *Indiana Ins. Co. v. Capehart*, 108 Ind. 270; *Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.*, 13 Tex. Civ. App. 64, 35 S. W. 955.

³¹⁶ *Huesinkveld v. St. Paul F. & M. Ins. Co. (Iowa)*, 76 N. W. 696.

³¹⁷ *Western Assur. Co. v. McCarty*, 18 Ind. App. 449, 27 Ins. Law J. 187, 48 N. E. 265.

³¹⁸ *Wright v. London Fire Ins. Co.*, 12 Mont. 474, 19 L. R. A. 211; *Anthony v. German American Ins. Co.*, 48 Mo. App. 65; *Aetna Ins. Co. v. Shyer*, 85 Ind. 362; *Searle v. Dwelling House Ins. Co.*, 152 Mass. 263. As to effect of service of process on adjuster, see *Lesure Lumber Co. v. Mut. Fire Ins. Co.*, 101 Iowa, 514, 70 N. W. 761.

³¹⁹ *Richards v. Continental Ins. Co.*, 83 Mich. 508.

APPRAISERS.

§ 118. Appraisers are arbiters appointed by the insurer and the insured to settle disputes as to amount of loss. They must be disinterested.

Most insurance policies contain a clause providing in effect that "in case of loss and a failure of the parties to agree as to the amount of the loss, the amount of such loss shall be determined by disinterested appraisers" or arbitrators. Such provisions are valid. The evident object is to furnish a convenient court of appraisal and arbitration to settle real differences of opinion, without the delay and cost of a suit for that purpose.³²⁰

RATIFICATION AND ADOPTION OF ACT OF AGENT.

§ 119. If an insurance company ratifies or adopts an unauthorized act of its agent, or of one assuming to act for it, the act is as binding as though authorized when done.

An insurer can only adopt and ratify acts which it could authorize others to do.

Agents can only ratify what they can authorize.

What one assumes to do for another without any authority, or in excess of his actual authority, does not primarily bind the latter. The mere assumption of authority by a spurious agent, or the assumption of false authority by an actual agent, does not alone give grounds for claims against a principal. But the doing of any act without previous authority may be ratified and adopted, if the act be of such a nature and kind that its commission could have been entrusted to an agent. And an adoption or ratification by an insurer of such unauthorized act, with full knowledge of the facts, is equivalent to a precedent authority to perform the act, whether arising through contract or tort. The ratification or adoption relates

³²⁰ Post, c. 15, "Arbitration and Award."

back to the time of inception of the transaction, and the act is as binding as though it was authorized when done.³²¹

An act which is in excess of the charter of a corporation involves an unauthorized exercise of corporate power on the part of the company, and this objection cannot be obviated by any subsequent ratification, either by the agents, or the shareholders of the corporation. Hence an insurer cannot ratify an act prohibited by law, or by its charter, or which is contrary to public policy.³²²

An agent can bind his principal by ratification of another's act, only when the act done is within the scope of the agent's authority. He cannot ratify his own unauthorized act, nor that of his co-agent, or superior. A ratification must be effected by the principal, or by some agent by whom the act might rightfully have been performed.³²³

Illustrations of Ratification.

Upon being notified of an unauthorized act of its agent the principal has a right to elect whether he will affirm it, or not; and so long as the rights of the parties are unchanged he cannot be prevented from exercising such right because the other party prefers to consider the contract invalid.³²⁴ If the prin-

³²¹ *In re Insurance Co. of Pennsylvania*, 22 Fed. 109; *McArthur v. Home Life Ass'n*, 73 Iowa, 336, 35 N. W. 430; *National Life Ins. Co. v. Minch*, 53 N. Y. 144; *Andrews v. Aetna Life Ins. Co.*, 92 N. Y. 596; *Kansas Farmers' Fire Ins. Co. v. Saindon*, 52 Kan. 486, 39 Am. St. Rep. 356; *Southern Life Ins. Co. v. McCain*, 96 U. S. 84; *Morse v. St. Paul F. & M. Ins. Co.*, 21 Minn. 407; *Abraham v. North German Ins. Co.*, 40 Fed. 717; *Godfrey v. New York Life Ins. Co.*, 70 Minn. 224.

³²² *Swett v. Citizens' Mut. Relief Soc.*, 78 Me. 541; *Morawetz, Priv. Corp.* § 619.

³²³ *Mound City Mut. Life Ins. Co. v. Huth*, 49 Ala. 530; *Union Mut. Life Ins. Co. v. Masten*, 3 Fed. 881; *Crim's Appeal*, 66 Pa. St. 474; *Huesinkveld v. St. Paul F. & M. Ins. Co. (Iowa)*, 76 N. W. 697.

³²⁴ *Andrews v. Aetna Life Ins. Co.*, 92 N. Y. 596.

cipal does not promptly repudiate the unauthorized act he will be held to have ratified it.³²⁵ Defendant's agent, authorized to make contracts, knew that plaintiff had paid the premium to a broker and accepted the responsibility of the latter. Subsequently plaintiff desired to make an addition to the premises which would increase the risk, and applied to the agent for an indorsement of his consent on the policy. The agent told him that the policy would have to be forwarded to the company; but the consent would be given, he might rely upon it and go on with his addition. The company knew that the policy had been issued, and had notified the agent that it declined to take the risk; of this, the agent did not inform plaintiff. Afterward the agent sent the policy to the company for the indorsement plaintiff desired, and informed it of the transaction concerning the premium. The policy was kept without notifying the agent that consent would not be given, or that it would be deemed canceled. By its silence the company was held to have ratified the act of its agent in accepting the responsibility of the broker.³²⁶

Plaintiffs applied for insurance to one whom they thought to be defendant's agent. He assumed to act as such, wrote the application, and sent it to defendant with his name upon it as agent. It was received and a policy issued in pursuance of it, the name of the assumed agent being upon it; it was sent to him, and he remitted the premium. These acts amounted to a recognition of the assumed agency, and defendant was bound by his knowledge concerning misdescriptions in the policy and by his waiver of conditions therein.³²⁷

³²⁵ *Southern Life Ins. Co. v. McCain*, 96 U. S. 84; *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495.

³²⁶ *Bennett v. Maryland Fire Ins. Co.*, 14 Blatchf. 422, Fed. Cas. No. 1,321.

³²⁷ *Packard v. Dorchester Mut. Fire Ins. Co.*, 77 Me. 144.

B. had power of attorney from A. to sign his name to policies of insurance. B. signed a slip for a policy, and his clerk, in his absence and for him, executed a policy conformably to the slip. After it was so executed it was shown to A. and he offered terms of settlement. Held, an adoption of the clerk's act.³²⁸ In defense to an action on a policy, a breach of warranty was alleged. It was replied that the statements relied on as warranties were inserted in the application by the agent of defendant, without fraud or collusion on plaintiff's part. It appeared that J. & W. were doing business together as insurance agents, J. being general agent of the H. company; they induced plaintiff and M. to sign a blank application for insurance upon the latter's life, which was filled up by W., signed by him as agent, and delivered to J., who went with it to the office of the W. company, where he was presented by an officer of H. company as its general agent. The president of the W. company struck out of the application the printed word "Home" and inserted in lieu thereof "World Mutual," accepted the risk, allowed J. the usual agent's commission, and the transaction and his name as agent were entered in the company's books; and the policy and premium receipt were delivered to J., who gave them to plaintiff. Held, that the W. company adopted the acts of J. & W. and was estopped from claiming a warranty.³²⁹

DUTIES AND LIABILITIES OF AGENTS.

§ 120. The duties and liabilities of an insurance agent to his principal depend upon the terms and nature of his employment, and the character of the work assigned to him.

The agent must obey instructions and discharge his duties with absolute honesty, and with reasonable prudence and diligence.

³²⁸ *Mason v. Joseph*, 1 Smith, J. P. Eng. 406.

³²⁹ *Mowry v. Rosendale*, 74 N. Y. 360.

He is liable to his principal for damages resulting from his failure so to do.

An agent who is employed to insure, or who agrees to insure property, and wilfully neglects so to do, is liable to the same extent the insurer would have been if the property had been insured according to instructions or agreement.

To Insurer.

The absolute duty of an agent depends to some extent upon the character of his agency and the nature of his employment. An agent must always obey his instructions and discharge his duties to his principal with good faith, and reasonable care, and diligence, and for failure so to do he can be compelled to respond in damages. If an agent disobeys instructions, he cannot shield himself by proof that he intended to benefit his principal. When he is invested with discretion in certain matters, he is only responsible for good faith and the honest exercise of his best judgment. If his instructions are vague, or indefinite, and susceptible of different interpretations, the agent is warranted and protected in any reasonable construction which he honestly and in good faith adopts.³³⁰ He is bound to have knowledge of the existing usages of the place where he does business, and must conform thereto.³³¹ And it is the duty of a sub-agent who is subject to the authority of a superior agent who acts for the insurer, to obey such orders as his superior may give him relative to the business of the company and risks taken by him. Thus,

³³⁰ *Royal Ins. Co. v. Clark*, 61 Minn. 476; *Phoenix Ins. Co. v. Pratt*, 36 Minn. 409; *Shaw v. Aetna Ins. Co.*, 49 Mo. 578 (agent of assured); *Hanover Fire Ins. Co. v. Ames*, 39 Minn. 150; *Washington F. & M. Ins. Co. v. Chesebro*, 35 Fed. 477; *Phoenix Ins. Co. v. Frissell*, 142 Mass. 513; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278; *Greenleaf v. Moody*, 13 Allen (Mass.), 363; *Winne v. Niagara Fire Ins. Co.*, 91 N. Y. 185; *Ewell's Evans, Agency*, §§ 234, 327 et seq.; *Story, Agency*, § 165 et seq.

³³¹ *Mallough v. Barber*, 4 Camp. 150.

if a state agent directs a local agent to cancel a risk taken by him and the order is not obeyed, the insurer can recover from the latter the amount it is compelled to pay upon a loss by reason of the policy not being cancelled.³³²

Where an agent issues a policy upon a forbidden risk, and later fails to obey the directions of his company to cancel the policy, he is liable to the insurer for the amount the insurer has to pay upon a loss subsequently occurring.³³³ And it is no defense to show that the agent had given directions to cancel the policy to the broker through whom the insurance had been obtained, notwithstanding an offer to prove that it was the universal custom of all insurance agents to give such orders to the broker who obtained the business.³³⁴ It is incumbent upon an agent to obey orders with all reasonable dispatch. Thus in a Massachusetts case, defendant, an agent for plaintiff, received orders to cancel a policy he had issued. The letter containing this instruction was received the day after it was written; and the evidence tended to show that defendant could have notified insured within half an hour after it was received. Defendant was agent for another company, and on the day the letter was received wrote a policy therein, which he designed to take the place of plaintiff's policy, but did not inform insured of anything concerning the matter until after his property was burned, five days later, and the court held that this evidence warranted a finding that defendant did not exercise such diligence as was required, and that an action was maintainable against him to recover the amount which plaintiff paid.³³⁵

³³² *Phoenix Ins. Co. v. Pratt*, 36 Minn. 409, 31 N. W. 454.

³³³ *Hanover Fire Ins. Co. v. Ames*, 39 Minn. 150; *Sun Fire Office v. Ermentrout*, 11 Pa. Co. Ct. R. 21, 21 Ins. Law J. 1055.

³³⁴ *Franklin Ins. Co. v. Sears*, 21 Fed. 290.

³³⁵ *Phoenix Ins. Co. v. Frissell*, 142 Mass. 513.

But the agent does not incur liability through the failure to do his whole duty, where he acts in good faith and his act does not prejudice his principal. The following circumstances were held to give the insurer only a right to recover nominal damages at most, viz.: Defendant, as agent for plaintiff, solicited and obtained an application for insurance upon a building which was being erected for a hotel. It was not quite completed and was not used for that purpose when the application, which described it as occupied as a hotel, was made. Defendant knew the facts but did not notify plaintiff. A loss occurred before the building was occupied, and insurer was held liable because of the knowledge of its agent. The agent acted in good faith, and the contract was not less valuable to plaintiff than it would have been if the facts corresponded with the statements in the application.³³⁶

To Insured or Applicant.

An agent who undertakes to procure insurance upon certain property must place the insurance promptly with companies of reputed responsibility and good credit.³³⁷ If he unjustifiably fails to procure the same, he thereby assumes the risk, and becomes liable in case of loss to pay as much thereof as would have been covered by the policy he agreed to procure, if the same had been issued. And if an agent representing several insurance companies orally insures property from a given time, and agrees to issue a policy thereon, but by reason of no particular company being agreed upon, the contract is not complete, and through omission of the agent no policy is issued before a loss occurs upon such property, the agent is liable to the extent of the amount of the policy he

³³⁶ *State Ins. Co. v. Richmond*, 71 Iowa, 519, 32 N. W. 496.

³³⁷ *Hurrell v. Bullard*, 3 Fost. & F. 445; 2 Phillips, *Ins.* (3d Ed.), p. 553, § 1895; 1 Joyce, *Ins.* p. 821.

agreed to issue, not exceeding in any case the amount of the actual loss.³³⁸

Notwithstanding a valid insurance may exist, an agent is liable for the amount received by him as premium on failure to keep his agreement to deliver a policy.³³⁹

If an agent who has received the premium for insurance has not paid it to his principal, or assumed any liability on account of it before the latter becomes insolvent, and the person who has paid the money notifies the agent that he claims it and does not rely upon the policy, the agent is liable to him for the amount, though the policy was not surrendered until after suit was brought.³⁴⁰

An action of deceit was held to lie in favor of the insured against an insurance agent under the following circumstances: A., an agent for an insurance company, solicited B. to take insurance upon store premises. B. assented; A. handed him a policy and received the premium. Observing a restriction in the policy concerning keeping petroleum without written consent from the company, B. remarked that he was obliged to keep a little, and inquired whether the fact ought not to be noted on the policy. A. assured him that the policy was all right, and that so long as a single barrel of petroleum only was kept, it was never taken notice of; that it was only when it was kept in large quantities that it should be noted on the policy. B. accepted the policy on the faith of these represen-

³³⁸ *Stadler v. Trever*, 86 Wis. 42, 56 N. W. 187; *Lindsay v. Pettigrew*, 5 S. D. 500, 59 N. W. 726; 3 *Sutherland, Damages*, 9; *Smith v. Price*, 2 Fost. & F. 748; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645; *Shoenfeld v. Fleisher*, 73 Ill. 404; *Beardsley v. Davis*, 52 Barb. (N. Y.) 159. See, also, *Sanches v. Davenport*, 6 Mass. 258. As to what completes the contract, see *Arrott v. Walker*, 118 Pa. St. 249.

³³⁹ *Collier v. Bedell*, 39 Hun (N. Y.), 238.

³⁴⁰ *Smith v. Binder*, 75 Ill. 492.

tations. After a loss he sued the company and was unsuccessful because a barrel of petroleum had been kept, and A. had no authority to waive the condition. The court decided that A. was personally liable for the loss, having given a positive assurance in excess of his authority and that the fact that he might have been guilty of no intentional fraud or moral turpitude did not exempt him from liability.³⁴¹

³⁴¹ Kroeger v. Pitcairn, 101 Pa. St. 311. See note 13.

CHAPTER IX.

INSURABLE INTEREST.

§ 121-122. In Property—Necessity and Nature.

123-124. — Duration and Continuance.

125-127. In Lives.

IN PROPERTY — NECESSITY AND NATURE.

§ 121. It is essential to the existence of a valid contract of insurance, in respect to property or a property interest, that the payee have an insurable interest in the subject matter insured.

§ 122. Any one has an insurable interest in property when he is so situated in respect to it, or has such relation to or concern in it, or liability in connection with it, that he is directly and pecuniarily interested in and benefited by its preservation, and would be directly and pecuniarily prejudiced and damaged in respect to it by the happening or occurrence of the loss, damage, peril or event insured against.

The insured must have some kind of pecuniary interest in the property or of accountability for its safety, and he can only recover to the extent of that interest. What constitutes an insurable interest has been the subject of much discussion in the cases and by authorities, and is often a question of great difficulty. What particular interests are insurable has frequently to be decided by a consideration of the special circumstances wherein the question arises. It has well been said that "every interest in property, or any relation thereto or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest."¹

¹ Civil Code Cal. § 2546; Civ. Code N. Y. 1366; Trustees of St. Clara Female Academy v. Northwestern Nat. Ins. Co., 98 Wis. 257, 73 N. W. 769.

Contracts of insurance, where the insured had no interest, were permitted at common law, but the manifest evils attending such contracts and the temptation which they afforded for fraud and crime led to the enactment in England of Statute 18 Geo. II. c. 37, prohibiting wager policies, and this has been followed by the enactment of some similar statutes in America.² Though an insurable interest is necessary to support a policy and to take it outside of the rule prohibiting wagers, this interest need not necessarily be a right which can legally be enforced against the property; it need not be an interest which may be called ownership. A direct pecuniary interest in the property insured, of such a nature that the insured will be damaged and suffer pecuniary loss by the happening of the event insured against, is sufficient. Whenever there is a real interest to protect, and a person is so situated with respect to the subject of insurance that its destruction would, or might reasonably be expected to, impair the value of that interest, an insurance on such interest would not be a wager, whether the interest was an ownership in or right to the possession of the property, or simply an advantage of a pecuniary character having a legal basis but dependent upon the continued existence of the subject. An insurable interest may be legal or equitable, vested or contingent, existing or inchoate, but it must be more than a mere hope or expectation,

² *Craufurd v. Hunter*, 8 Term R. 13; *Alsop v. Commercial Ins. Co.*, 1 Sumn. 467, Fed. Cas. No. 262; *Williams v. Smith*, 2 Caines Cas. (N. Y.) 13.

The obtaining of insurance on the property in which the insured has no interest, whether covered by an open or valued policy, comes under the head of a wagering contract, and is illegal and void. *Waugh v. Beck*, 114 Pa. St. 422. But the insured need not have the legal title. It is sufficient if he be the beneficial owner. *Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. St. 149.

which may be frustrated by the happening of some event.³ Different parties may have an insurable interest in the same subject matter.⁴ And the same party may have different insurable interests in the same subject matter because of his different relations thereto.⁵

SAME — DURATION AND CONTINUANCE.

§ 123. This insurable interest must exist at some time during the life of the risk and at the time of the loss.⁶

§ 124. In the absence of a specific provision in the policy avoiding it for alienation, an interruption or temporary suspension of interest is not fatal to the right of the insured to recover to the extent of his interest at the time of loss.⁷

³ *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47; *National Filtering Oil Co. v. Citizens' Ins. Co.*, 106 N. Y. 535; *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40; *Horsch v. Dwelling House Ins. Co.*, 77 Wis. 4; *Warnock v. Davis*, 104 U. S. 775; *Wainer v. Milford Mut. Fire Ins. Co.*, 153 Mass. 335; *Reynolds v. Iowa & N. Ins. Co.*, 80 Iowa, 563, 46 N. W. 659; *Bayles v. Hillsborough Ins. Co.*, 27 N. J. Law, 163; *Eastern R. Co. v. Relief Fire Ins. Co.*, 98 Mass. 420; *Swift v. Vermont Mut. Fire Ins. Co.*, 18 Vt. 305; *Illinois Mut. Fire Ins. Co. v. Andes Ins. Co.*, 67 Ill. 362; *Fenn v. New Orleans Mut. Ins. Co.*, 53 Ga. 578; *Riggs v. Commercial Mut. Ins. Co.*, 125 N. Y. 12; *Helvetia Swiss Fire Ins. Co. v. E. P. Allis Co.*, 11 Colo. App. 264, 53 Pac. 242; *Sawyer v. Dodge County Mut. Ins. Co.*, 37 Wis. 503; *Coursin v. Pennsylvania Ins. Co.*, 46 Pa. St. 323; *United States v. American Tobacco Co.*, 166 U. S. 468.

⁴ *Harris v. York Mut. Ins. Co.*, 50 Pa. St. 341; *Fox v. Phoenix Fire Ins. Co.*, 52 Me. 333; *Ely v. Ely*, 80 Ill. 532; *Insurance Co. v. Haven*, 95 U. S. 242.

⁵ *Germania Fire Ins. Co. v. Thompson*, 95 U. S. 547.

⁶ *Hooper v. Robinson*, 98 U. S. 528; *Lockhart v. Cooper*, 87 N. C. 149. But it has sometimes been held that the insurer must have an insurable interest both at the time the insurance was effected and at the time of the loss. *Chrisman v. State Ins. Co.*, 16 Or. 283; *Sadlers' Co. v. Badcock*, 2 Atk. 554. See, also, *Fowler v. New York Ind. Ins. Co.*, 26 N. Y. 422; *Graham v. Firemens' Ins. Co.*, 2 Disn. (Ohio) 255; *Folsom v. Merchants' Mut. Marine Ins. Co.*, 38 Me. 414.

⁷ *Worthington v. Bearse*, 12 Allen (Mass.), 382; *Lane v. Maine*

Illustrations of Insurable Interests in Property.

Each of the following has an insurable interest in the property designated:

An "owner" of property or of a divided or undivided portion thereof or interest therein, to the extent to which he would be damnified by its damage or destruction;⁸ a "mortgagor," so long as he retains an ownership in the whole or some part of the property he has mortgaged;⁹ a "mortgagee" in the property or premises to the extent of the unpaid debt or contingent claim secured by his mortgage;¹⁰ and different mortgagees of the same property may each insure his independent interest,¹¹ which interest is destroyed by the payment of the debt or the discharge and satisfaction of the obligation or liability secured,¹² but not by an executory contract to convey

Mut. Fire Ins. Co., 3 Fairf. (Me.) 44; Peoria M. & F. Ins. Co. v. Anapow, 51 Ill. 283; Mills v. Farmers' Ins. Co., 37 Iowa, 400. See, also, Kempton v. State Ins. Co., 62 Iowa, 83; Planters' Mut. Ins. Co. v. Rowland, 66 Md. 236; Power v. Ocean Ins. Co., 19 La. 28. See post, "Alienation."

⁸ Castner v. Farmers' Mut. Fire Ins. Co., 46 Mich. 15; David v. Williamsburgh City Fire Ins. Co., 83 N. Y. 265; Stephens v. Illinois Mut. Fire Ins. Co., 43 Ill. 327; Norwich Fire Ins. Co. v. Boomer, 52 Ill. 442; Foley v. Manufacturers' & B. F. Ins. Co., 152 N. Y. 131; United States v. American Tobacco Co., 166 U. S. 468; Hooper v. Robinson, 98 U. S. 528. See ante, notes 3-5.

⁹ Lycoming Fire Ins. Co. v. Jackson, 83 Ill. 302. Even after foreclosure, but before the expiration of the time for redemption. Richland County Mut. Ins. Co. v. Sampson, 38 Ohio St. 672; Essex Sav. Bank v. Meriden Fire Ins. Co., 57 Conn. 335, 17 Atl. 930, 18 Atl. 324; Walsh v. Philadelphia Fire Ass'n, 127 Mass. 383.

¹⁰ Traders' Ins. Co. v. Robert, 9 Wend. (N. Y.) 404; Haley v. Manufacturers' F. & M. Ins. Co., 120 Mass. 292; Westchester Fire Ins. Co. v. Foster, 90 Ill. 121.

¹¹ Fox v. Phoenix Fire Ins. Co., 52 Me. 333.

¹² Sussex County Mut. Ins. Co. v. Woodruff, 26 N. J. Law, 541; Carpenter v. Providence W. Ins. Co., 16 Pet. (U. S.) 495.

such interest;¹³ a "bailor" has an insurable interest so long as he remains an owner of the property bailed; a "bailee" in the bailed property in his possession, to the extent of his special interest in such property, or his lien against it, or his liability as insurer of it;¹⁴ a "pledgor" as an owner of the property bailed;¹⁵ an "inn-keeper" in the goods or property of his guests to the extent to which he is responsible for their safe-keeping and protection;¹⁶ a "common carrier" in property in its care and possession, and in its own name may sue for and recover the value of the property damaged or destroyed, holding the excess over its own interest for the benefit of the owner;¹⁷ a "warehouseman" in merchandise held by him as his own, or in trust or storage, to the extent of his lien upon the merchandise, or his liability for its safe keeping;¹⁸ a "commission merchant" who has the custody of, or is responsible for, property consigned to him, in such property to its full value;¹⁹ a "consignor" so long as he

¹³ *Haley v. Manufacturers' F. & M. Ins. Co.*, 120 Mass. 292; *Smith v. Columbia Ins. Co.*, 17 Pa. St. 253.

¹⁴ *Aetna Ins. Co. v. Jackson*, 16 B. Mon. (Ky). 258; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387; *Providence County Bank v. Benson*, 24 Pick. (Mass.) 204.

¹⁵ *Nussbaum v. Northern Ins. Co.*, 37 Fed. 524; *Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 607; *Home Ins. Co. v. Baltimore W. Co.*, 93 U. S. 527.

¹⁶ *Eastern R. Co. v. Relief Fire Ins. Co.*, 98 Mass. 420.

¹⁷ *Liverpool & L. & G. Ins. Co. v. McNeill (C. C. A.)*, 89 Fed. 131; *Fire Ins. Ass'n v. Merchants' & Miners' Transp. Co.*, 66 Md. 339; *Home Ins. Co. v. Peoria & P. U. Ry. Co.*, 178 Ill. 64, 52 N. E. 862; *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312. And may insure itself against the carelessness of its own employees. *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387.

¹⁸ *Pittsburgh Storage Co. v. Scottish U. & N. Ins. Co.*, 168 Pa. St. 522. See, also, *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387.

¹⁹ *Baxter v. Hartford Fire Ins. Co.*, 11 Biss. 306, 12 Fed. 481; *St. Paul F. & M. Ins. Co. v. Kelly*, 43 Kan. 741; *Ferguson v. Pekin Plow Co.*, 141 Mo. 161, 42 S. W. 711.

retains an interest in the property consigned and to the extent of that interest;²⁰ a "consignee or factor;"²¹ an "agent," when in possession of property or responsible for its safety or protection;²² a "trustee" in the trust property held by him as such,²³ a *cestui que trust*,²⁴ an "assignee,"²⁵ and a "receiver,"²⁶ in the property held by them in their respective capacities; a "stockholder" in a corporation organized for pecuniary profit has an interest in the property of the corporation, even though that interest does not amount to an estate, either legal or equitable, in the property insured;²⁷ an "indorser or surety," e. g. the liability of a mortgagee as indorser of a mortgage note to the assignee of the mortgage gives him an insurable interest in the mortgaged property;²⁸ so a mortgagor who remains liable on the mortgage note retains an insurable interest in the property mortgaged, though he conveys his legal title to it;²⁹ a "rein-

²⁰ See ante, note 6.

²¹ Gordon v. Wright, 29 La. Ann. 812; Milburn Wagon Co. v. Evans, 30 Minn. 89; Johnson v. Campbell, 120 Mass. 449; Shaw v. Aetna Ins. Co., 49 Mo. 578; Hough v. Peoples' Fire Ins. Co., 36 Md. 398.

²² See ante, "Consignee," "Warehouseman," "Bailee."

²³ Young v. Union Ins. Co., 24 Fed. 279; Dick v. Franklin Fire Ins. Co., 81 Mo. 103; Carpenter v. Providence W. Ins. Co., 16 Pet. (U. S.) 495.

²⁴ Gordon v. Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 249.

²⁵ Sibley v. Prescott Ins. Co., 57 Mich. 14.

²⁶ Thompson v. Phoenix Ins. Co., 136 U. S. 287.

²⁷ Riggs v. Commercial Mut. Ins. Co., 125 N. Y. 7; Seaman v. Enterprise F. & M. Ins. Co., 18 Fed. 250, 21 Fed. 778; Warren v. Davenport Fire Ins. Co., 31 Iowa, 464. See Creed v. Sun Fire Office of London, 101 Ala. 522.

²⁸ Williams v. Roger Williams Ins. Co., 107 Mass. 377.

²⁹ Hanover Fire Ins. Co. v. Bohn, 48 Neb. 743, 67 N. W. 774; Caley v. Hoopes, 86 Pa. St. 493; Germania Fire Ins. Co. v. Thompson, 95 U. S. 547.

suror;"³⁰ "one who has an interest in royalties;" one who has a contract with the owners of a factory entitling him to the payment of royalties on the output of the factory, has an insurable interest in it;³¹ "co-partners," in the partnership property;³² a "creditor;" one who has bought goods on credit for the benefit of the seller, when the insurer agrees to the arrangement.³³ The creditor of a deceased debtor whose estate is insufficient to pay the debts, has an insurable interest in the property of the estate, which by law, may be subjected by proceedings *in rem* to the payment of the debts; but the recovery cannot exceed the amount of the insurable interest;³⁴ a "sheriff" or other officer who takes goods under a writ of attachment acquires a special property in the goods so taken, which constitutes an insurable interest;³⁵ and the receptor of goods attached may insure them in his own name,³⁶ and also the attaching or levying creditor.³⁷ "Lessee and lessor;" a leasehold interest in real estate is an

³⁰ See post, c. 19, "Reinsurance."

³¹ National Filtering Oil Co. v. Citizens' Ins. Co., 34 Hun, 556, 106 N. Y. 535.

³² Converse v. Citizens' Mut. Ins. Co., 10 Cush. (Mass.) 37; Phoenix Ins. Co. v. Hamilton, 14 Wall. (U. S.) 504; Manhattan Ins. Co. v. Webster, 59 Pa. St. 227; Grabbs v. Farmers' Mut. Fire Ins. Ass'n, 125 N. C. 389, 34 S. E. 503; Harvey v. Cherry, 76 N. Y. 436. See ante, note 1.

³³ Roos v. Merchants' Mut. Ins. Co., 27 La. Ann. 409; Bates v. Equitable Ins. Co., 10 Wall. (U. S.) 33; Guiterman v. German-American Ins. Co., 111 Mich. 626.

³⁴ Creed v. Sun Fire Office of London, 101 Ala. 522, 23 L. R. A. 177; Spare v. Home Mut. Ins. Co., 8 Sawy. 618, 15 Fed. 707. The attaching creditor has an insurable interest in the property attached, Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 47; Donnell v. Donnell,

³⁵ White v. Madison, 26 N. Y. 117; Franklin Fire Ins. Co. v. Findlay, 6 Whart. (Pa.) 483.

³⁶ Fireman's Ins. Co. v. Powell, 13 B. Mon. (Ky.) 312.

³⁷ Wood, Fire Ins. §§ 298-309.

insurable interest;³⁸ the landlord and tenant each has an insurable interest in the premises demised, which may be protected by a contract of insurance;³⁹ the lessor also has an insurable interest in such goods of the lessee as are liable to seizure for rent;⁴⁰ a "tenant by curtesy" has an insurable interest in property to which he holds such a title.⁴¹ "Purchaser;" a mere qualified or equitable interest in property is insurable. The purchaser of property under an agreement requiring payment within a certain time has an insurable interest during the life of the contract, even although payments are not made when due;⁴² so with one who has made a conditional agreement to purchase.⁴³ One in possession" of a building under an agreement with the owner by which he is to occupy it and keep the building in repair;⁴⁴ and a managing owner in possession;⁴⁵ and one in possession and entitled to the beneficial use of buildings with an oral

³⁸ Philadelphia Tool Co. v. British American Assur. Co., 132 Pa. St. 236.

³⁹ Ely v. Fly, 80 Ill. 532; Carey v. London P. F. Ins. Co., 33 Hun (N. Y.), 315; Insurance Co. v. Haven, 95 U. S. 242; Georgia Home Ins. Co. v. Jones, 49 Miss. 80. And a sublessee, Mitchell v. Home Ins. Co., 32 Iowa, 42.

⁴⁰ Columbia Ins. Co. v. Cooper, 50 Pa. St. 331.

⁴¹ Kyte v. Commercial Union Assur. Co., 144 Mass. 43; Harris v. New York Mut. Ins. Co., 50 Pa. St. 341. See ante, p. , "Lessee." And a life-tenant, Cross v. National Fire Ins. Co., 132 N. Y. 133; Home Ins. Co. v. Field, 42 Ill. App. 392. And a remainder-man, Redfield v. Holland Purchase Ins. Co., 56 N. Y. 354.

⁴² Bohn Mfg. Co. v. Sawyer, 169 Mass. 477; Holbrook v. St. Paul F. & M. Ins. Co., 25 Minn. 229; Southern Insurance & T. Co. v. Lewis, 42 Ga. 587; Cumberland Bone Co. v. Andes Ins. Co., 64 Me. 466; Gilman v. Dwelling-House Ins. Co., 81 Me. 488.

⁴³ International Trust Co. v. Norwich Union Fire Ins. Soc. (C. C. A.), 71 Fed. 81.

⁴⁴ Berry v. American Cent. Ins. Co., 132 N. Y. 49; Cross v. National Fire Ins. Co., 132 N. Y. 133.

⁴⁵ The Fern Holme, 46 Fed. 119; The Gulnare, 42 Fed. 861.

contract for the conveyance of the land on which they stand;⁴⁶ and a purchaser on conditional sale with right to use;⁴⁷ a "contractor, materialman or mechanic" in building upon which they have or are entitled to a lien or on buildings which they are erecting under contract;⁴⁸ a "husband" in the homestead of his wife which he occupies with her;⁴⁹ a husband and wife sometimes in each other's property;⁵⁰ but a husband has not ordinarily any insurable interest in his wife's separate property.⁵¹

⁴⁶ *Horsch v. Dwelling House Ins. Co.*, 77 Wis. 4, 8 L. R. A. 806; *Bicknell v. Lancaster City & County Fire Ins. Co.*, 58 N. Y. 677.

⁴⁷ *Holbrook v. St. Paul F. & M. Ins. Co.*, 25 Minn. 220; *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 120; *Grange Mill Co. v. Western Assur. Co.*, 118 Ill. 396. See, also, *McLean v. Hess*, 106 Ind. 555; *Reed v. Williamsburg City Fire Ins. Co.*, 74 Me. 537; *Little v. Phœnix Ins. Co.*, 123 Mass. 380; *Acer v. Merchants' Ins. Co.*, 57 Barb. (N. Y.) 68.

⁴⁸ *Insurance Co. v. Stinson*, 103 U. S. 25; *Planters' & Merchants' Ins. Co. v. Thurston*, 93 Ala. 255; *Looney v. Looney*, 116 Mass. 283.

⁴⁹ *Merrett v. Farmers' Ins. Co.*, 25 Iowa, 11; *Reynolds v. Iowa & N. Ins. Co.*, 80 Iowa, 563, 46 N. W. 659.

⁵⁰ *Clarke v. Firemens' Ins. Co.*, 18 La. 431; *German American Ins. Co. v. Paul (Indian T.)*, 53 S. W. 442; *Warren v. Springfield F. & M. Ins. Co.*, 13 Tex. Civ. App. 466, 35 S. W. 810; *Miotke v. Milwaukee Mechanics' Ins. Co.*, 113 Mich. 166, 71 N. W. 463; *Field v. Insurance Co. of America*, 6 Biss. 121, Fed. Cas. No. 4,767.

⁵¹ *Agricultural Ins. Co. v. Montague*, 38 Mich. 548; *Traders' Ins. Co. v. Newman*, 120 Ind. 554.

Illustrations of No Insurable Interest.

No insurable interest exists under a parol contract made by a married woman to convey land, *Perry v. Mechanics' Mut. Ins. Co.*, 11 Fed. 478; nor a prospective purchaser to whom the title of the property has not passed, *Heald v. Builders' Mut. Fire Ins. Co.*, 111 Mass. 38. The right of reimbursement from property, for advances made for its protection, until ascertained and defined by decree, is so uncertain an interest that it is not insurable. *Bishop v. Clay F. & M. Ins. Co.*, 49 Conn. 167. The mere holding of a judgment by a vendor of real estate, against a purchaser to secure part of the money, does not *per se* give the vendor an insurable interest in the property. *Light v. Countrymens' Mut. Fire Ins. Co.*, 169 Pa. St. 310.

IN LIVES.

§ 125. Public policy forbids the procuring of insurance upon a human life by one who has not an insurable interest in that life.

§ 126. To create an insurable interest which will support a life insurance contract there must be a reasonable ground, founded in the relations of the parties — either pecuniary, or of blood, or affinity — to expect some benefit or advantage from the continuance of the life of the assured.

§ 127. It is sufficient if such insurable interest exists at the time the insurance is effected.

It is a rule founded in public policy, and is of general application, that the contract of life insurance must be based upon an interest in the subject insured. In the absence of an insurable interest the policy, having nothing upon which to operate, must be regarded as a mere wager upon human life. It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. An insurable interest is not, necessarily, a definite pecuniary interest, such as is recognized and protected at law. It may be contingent, restricted as to time, or indeterminate in amount, but it must be actual and appreciable, so that the purpose of the party effecting the insurance will be to secure an advantage to the beneficiary, and not merely to put a wager upon human life. It may be stated generally to be such an interest, arising from the relation of the party obtaining the insurance, either as creditor, or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. This expectation of advantage or benefit need not be always capable of pecuniary estimation, for a parent has an insurable interest in the life of his child, a husband in the life of his wife, and a wife in the life of her husband. The natural affection, in such

cases, is considered as more powerful, as operating more efficaciously to protect the life of the insured, than any other consideration. In all cases there must be a reasonable ground to expect some benefit or advantage to the beneficiary from the continuance of the life insured; otherwise the beneficiary would be directly interested in the early death of the insured. A policy issued to one who is not directly interested in the continuance of the life of the insured has a tendency to create a desire for his death. Such policies are, therefore, independently of any statute upon the subject, condemned as being contrary to public policy.⁵²

Every person has an insurable interest in his own life, and may effect an insurance thereon for the benefit of a relative or friend. The essential thing is that the policy be obtained in good faith, and not for the purpose of speculating on the hazard of a life in which the insured has no interest.⁵³

⁵² *Connecticut Mut. Life Ins. Co. v. Schaeffer*, 94 U. S. 457; *Keystone Mut. Ben. Ass'n v. Norris*, 115 Pa. St. 446; *Lamont v. Grand Lodge*, 31 Fed. 180; *Amick v. Butler*, 111 Ind. 578; *Ruse v. Mutual Ben. Life Ins. Co.*, 23 N. Y. 516, 52 Cent. Law J. 381.

⁵³ *Bloomington Mut. Ben. Ass'n v. Blue*, 120 Ill. 121; *New York Mut. Ins. Co. v. Armstrong*, 117 U. S. 591; *Provident Life Ins. & Inv. Co. v. Baum*, 29 Ind. 236. A policy is not void as a wager policy where it is not obtained for a speculative purpose, although the beneficiary is neither a creditor, wife, child, parent, brother, nor sister of the insured. *Kentucky Life & Acc. Ins. Co. v. Hamilton* (C. C. A.), 63 Fed. 93; *Vivar v. Supreme Lodge, K. of P.*, 52 N. J. Law, 455; *Schonfield v. Turner*, 75 Tex. 324, 7 L. R. A. 189; *Hill v. United Life Ins. Ass'n*, 154 Pa. St. 29. A suit may be maintained upon the policy without proving an insurable interest. *American E. L. Ins. Co. v. Barr*, 68 Fed. 873, 16 C. C. A. 51; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Union Fraternal League v. Walton*, 109 Ga. 1, 46 L. R. A. 424. Compare *Vivar v. Supreme Lodge, K. of P.*, *supra*; *Schonfield v. Turner*, *supra*; *Life Ins. Clearing Co. v. O'Neill* (C. C. A.), 106 Fed. 800; and *Ruse v. Mutual Ben. Life Ins. Co.*, 23 N. Y. 516.

Continuity of Interest in Life.

A life policy, valid when issued, does not cease to be so by the termination of the interest of the assured in the life insured unless such be the stipulation of the policy. The law seems to be well settled that it is wholly unnecessary to prove an insurable interest in the life of the assured at the maturity of the policy, if it was valid at its inception; and

Illustrations of Wager Policies.

A policy issued by a mutual life insurance company whereby, upon the lapse of any policy, a sum equal in amount to its reserve value becomes an absolute liability of the company, to be paid to existing policy holders at a certain period, is void as a wager policy. *Fuller v. Metropolitan Life Ins. Co.*, 70 Conn. 647. And a policy obtained upon a person's life by others, who pay the premiums upon the understanding that they are to have the money collected upon the policy, is void. *Cisna v. Sheibley*, 88 Ill. App. 385; *Roller v. Moore's Adm'r*, 86 Va. 512, 6 L. R. A. 136; *Ruth v. Katterman*, 112 Pa. St. 251; *Warnock v. Davis*, 104 U. S. 779; *Missouri Valley Life Ins. Co. v. McCrum*, 36 Kan. 146.

A daughter has not necessarily an insurable interest in the life of her mother. *Continental Life Ins. Co. v. Volger*, 89 Ind. 572; *Life Ins. Clearing Co. v. O'Neill (C. C. A.)*, 106 Fed. 800. The relation of mother and son between a payee and a person whose life is insured does not *per se* always constitute an insurable interest. *Prudential Ins. Co. v. Humm*, 21 Ind. App. 525, 52 N. E. 772; *Peoples' Mut. Ben. Soc. v. Templeton*, 16 Ind. App. 126, 44 N. E. 809. A son-in-law has not an insurable interest in the life of his mother-in-law, *Rombach v. Piedmont & A. Life Ins. Co.*, 35 La. Ann. 233; *Stambaugh v. Blake (Pa.)*, 15 Atl. 705; nor a step-son in the life of his step-father, *United Brethren Mut. Aid Soc. v. McDonald*, 122 Pa. St. 324. An uncle cannot recover on a policy in his favor on the life of a nephew, unless he avers and proves a pecuniary interest therein. *Prudential Ins. Co. v. Jenkins*, 15 Ind. App. 297, 43 N. E. 1056; *Singleton v. St. Louis Mut. Ins. Co.*, 66 Mo. 63.

A nephew has not always an insurable interest in the life of an aunt, *Riner v. Riner*, 166 Pa. St. 617; nor a building association in the life of a member, *Tate v. Commercial Bldg. Ass'n*, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243; nor a college supported by a church in the life of a member of that church, *Trinity College v. Travellers' Ins. Co.*, 113 N. C. 244, 22 L. R. A. 291; nor an assignee in bankruptcy in the life of the bankrupt, *In re McKinney*, 15 Fed. 535.

in the absence of an express stipulation to the contrary the sum expressed on the face of the policy is the measure of recovery.⁵⁴

Interest of Assignee.

The assignment of a policy of life insurance to one not having an insurable interest in the life insured, is as objectionable from the standpoint of public policy as is the taking out of a policy under similar circumstances. Nor is its character changed because it is for a portion merely of the insurance money. The law might be easily evaded if the policy, or interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to pay a portion of the proceeds to designated persons, be transferred so as to entitle the assignee to receive the whole insurance money. But a policy of life insurance which does not contain any prohibition against its assignment is assignable by the insured for a valuable consideration, equally with any other chose in action, provided the assignment is made in good faith, and not to evade the law against wager policies.⁵⁵

There are, however, cases opposed to this view, and holding that a valid policy of insurance, effected by a person upon his own life, is assignable like an ordinary chose in action, and that the assignee is entitled upon the death of the insured to the full sum payable without regard to the consideration paid for the assignment, or the existence of an insurable interest in the life of the insured.⁵⁶

⁵⁴ *Appeal of Corson*, 113 Pa. St. 445; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457; *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24.

⁵⁵ *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116; *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380; *Connecticut Mut. Life Ins. Co. v. Luchs*, 108 U. S. 503; *Roller v. Moore's Adm'r*, 86 Va. 512.

⁵⁶ *St. John v. American Mut. Life Ins. Co.*, 13 N. Y. 31; *Olmsted v. Keyes*, 85 N. Y. 593; *Martin v. Stubbings*, 126 Ill. 387. In *Valton v.*

Interest of Creditor in Life of Debtor.

A creditor has, for the purpose of indemnifying himself against loss, an insurable interest in the life of his debtor. The amount of insurance taken out by a creditor upon the life of his debtor cannot be grossly disproportionate to the benefit which might be reasonably supposed to accrue from the continuance of the debtor's life, without leaving the transaction open to the criticism of being a speculation or wager upon the hazard of a life. The policy is valid in so far as it has been obtained and is carried in pursuance of a *bona fide* effort to secure payment of the debt. If the amount of the policy is so far in excess of the debt and the interest thereon and the expense of carrying the insurance, as to indicate an intent of the creditor to speculate upon the life of the debtor, the policy will be void.⁵⁷

National Fund Life Assur. Co., 20 N. Y. 32, it was said that one has an insurable interest in his own life, and no use made by him of the policy issued on his own life can convert it into a wagering contract.

⁵⁷ Rittler v. Smith, 70 Md. 261; Exchange Bank of Macon v. Loh, 104 Ga. 446; Ulrich v. Reinoehl, 143 Pa. St. 238, 13 L. R. A. 433; Helmetag's Adm'r v. Miller, 76 Ala. 183.

A creditor of a firm has an insurable interest in the life of each member of the firm, and they in turn have a similar interest in the life of every other firm indebted to them. Mitchell v. Union Life Ins. Co., 45 Me. 104; Lewis v. Phoenix Mut. Life Ins. Co., 39 Conn. 100; Rawls v. American Mut. Life Ins. Co., 27 N. Y. 282.

One who advances money for premiums on policies on another's life, under the agreement by the insured to repay the loans, is a creditor, and has an insurable interest. Reed v. Provident Sav. Life Assur. Soc., 36 App. Div. 250, 55 N. Y. Supp. 292.

The insurable interest of the creditor in the life of his debtor is not affected by the fact that the statute of limitations has run against it since the insurance was effected. Rawls v. American Life Ins. Co., 36 Barb. 357, 27 N. Y. 282.

Although a debtor has been discharged in bankruptcy, a moral obligation to pay his debts remains, which constitutes a good con-

Interest Founded on Relationship.

Mere relationship of itself is not sufficient to create an insurable interest. This relationship must be connected with a pecuniary interest, or some element of dependency, so that the beneficiary would, in reasonable probability, suffer a pecuniary loss, or fail to make a pecuniary gain, by the death of the assured. Sentiment or affection is not sufficient, of itself, to constitute an insurable interest, but the expected benefit must consist in service, maintenance or the like. In one relation only—the relation of husband and wife—is the actual existence of such a pecuniary interest unimportant; the reason being that the real pecuniary interest is found in so great a majority of cases involving this relation that the courts conclusively presume it to exist in every case.⁵⁸

sideration for a new promise to pay, which will give the promisee an insurable interest in the debtor's life. *Mutual Reserve Fund Life Ass'n v. Beatty* (C. C. A.), 93 Fed. 747.

A policy on the life of another for \$3,000, to secure a debt of \$70, is a mere wager policy. *Cammack v. Lewis*, 15 Wall. (U. S.) 643. And the taking out of a policy for a similar amount on the life of the debtor, by one who was a creditor to the extent of \$302, and the payment of premiums amounting to \$293, has been held not disproportionate. *Grant's Adm'rs v. Kline*, 115 Pa. St. 618. Compare *Ulrich v. Reinoehl*, 143 Pa. St. 238, 13 L. R. A. 433; *Amick v. Butler*, 111 Ind. 578; *Exchange Bank of Macon v. Loh*, 104 Ga. 446.

⁵⁸ *Warnock v. Davis*, 104 U. S. 775. The words "related to," in a statute permitting persons related to a member of a benefit society to be named as beneficiaries, include relatives by affinity as well as by blood. *Bennett v. Van Riper*, 47 N. J. Eq. 563, 14 L. R. A. 342. Under some constructions a step-father is a relative. *Simcoke v. Grand Lodge, A. O. U. W.*, 84 Iowa, 383, 15 L. R. A. 114; *Grand Lodge, A. O. U. W., v. McKinstry*, 67 Mo App. 82; *Hosmer v. Weich*, 107 Mich. 470, 65 N. W. 280, 67 N. W. 504.

Illustrations of Insurable Interest Among Relations.

A wife will have an insurable interest in the life of her husband, *Central Bank of Washington v. Hume*, 128 U. S. 195; and a husband in the life of his wife, *Watson v. Centennial Mut. Life Ass'n*, 21 Fed. 698; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Cur-*

Other Insurable Interests.

A partner has an insurable interest in his co-partner's life;⁵⁹ and a master and servant in each other's lives;⁶⁰ and an apprentice in a master's life;⁶¹ and a master or employer in the servant's life;⁶² a tenant in his landlord's life, where

rrier v. Continental Life Ins. Co., 57 Vt. 496; a father in the life of his minor son to whose earnings he is entitled, Loomis v. Eagle L. & H. Ins. Co., 6 Gray (Mass.), 396; Grattan v. National Life Ins. Co., 15 Hun (N. Y.), 74; Mitchell v. Union Life Ins. Co., 45 Me. 104; a son in the life of his father only when he has a pecuniary interest in the continuance of the father's life, Guardian Mut. Life Ins. Co. v. Hogan, 80 Ill. 35; Chicago Guaranty Fund Life Soc. v. Dyon, 79 Ill. App. 100. Compare Valley Mut. Life Ass'n v. Teewalt, 79 Va. 421; Crosswell v. Connecticut Ind. Ass'n, 51 S. C. 103, 28 S. E. 200; Reserve Mut. Ins. Co. v. Kane, 81 Pa. St. 154; Life Ins. Clearing Co. v. O'Neill (C. C. A.), 106 Fed. 800, 30 Ins. Law J. 603.

A grandchild has not an insurable interest in the life of a grandparent, merely by virtue of the relationship. Burton v. Connecticut Mut. Life Ins. Co., 119 Ind. 207. Compare Corbett v. Metropolitan Life Ins. Co., 55 N. Y. Supp. 775. Otherwise if the grandparent himself procures the insurance in favor of the grandchild. Elkhart Mut. Aid B. & R. Ass'n v. Houghton, 103 Ind. 286. A brother has an insurable interest in a sister's life, or a sister in a brother's life, where the element of dependency exists. Lord v. Dall, 12 Mass. 115; Hosmer v. Welch, 107 Mich. 470, 65 N. W. 280, 67 N. W. 504. An aunt has an insurable interest in the life of her niece who lives with her, and whom she has supported under circumstances creating a moral obligation on the latter's part to assist the former if necessary. Cronin v. Vermont Life Ins. Co., 20 R. I. 570, 40 Atl. 497. See, also, Morrell v. Trenton Mut. L. & F. Ins. Co., 10 Cush. (Mass.) 282, and notes in 57 Am. Dec. 92.

⁵⁹ Connecticut Mut. Life Ins. Co. v. Luchs, 108 U. S. 498; Valton v. National L. F. Life Assur. Soc., 22 Barb. (N. Y.) 9.

⁶⁰ Where a servant is hired at a certain salary, for a specified time, he has an insurable interest for that period in the master's life. Hebdon v. West, 3 Best & S. 579, 18 Cent. Law J. 347; Carpenter v. United States Life Ins. Co., 161 Pa. St. 9, 28 Atl. 943.

⁶¹ 12 West. Jur. 706.

⁶² Miller v. Eagle L. & H. Ins. Co., 2 E. D. Smith (N. Y.), 292; Summers v. United States L. A. & T. Co., 13 La. Ann. 504; Trenton Mut. L. & F. Ins. Co. v. Johnson, 24 N. J. Law, 576.

the latter is himself only a tenant for life, because the term depends on the continuance of the life;⁶³ an insurance company in the life insured by it;⁶⁴ a woman, sometimes, in the life of her betrothed;⁶⁵ a girl in the life of a man who has assumed parental relations towards her, although without any legal obligation;⁶⁶ any one dependent for support and maintenance upon the continued life of the assured;⁶⁷ and a surety in the life of the principal, to the extent of the suretyship.⁶⁸

⁶³ *Side v. Knickerbocker Life Ins. Co.*, 16 Fed. 650.

⁶⁴ *Dalby v. India & L. Life Assur. Co.*, 15 Com. B. 385.

⁶⁵ *McCarthy v. New England Order of Protection*, 153 Mass. 314, 11 L. R. A. 144; *Kinney v. Dodd*, 41 Ill. App. 49; *Taylor v. Travellers' Ins. Co.*, 15 Tex. App. 254, 39 S. W. 185; *Bogart v. Thompson*, 24 Misc. Rep. 581, 53 N. Y. Supp. 622; *Alexander v. Parker*, 144 Ill. 355, 19 L. R. A. 187.

⁶⁶ *Carpenter v. United States Life Ins. Co.*, 161 Pa. St. 9, 23 L. R. A. 571.

⁶⁷ *Adams's Adm'r v. Reed* (Ky.), 38 S. W. 420, 35 L. R. A. 692; *Batdorf v. Fehler* (Pa.), 9 Atl. 468; *Fitzpatrick v. Hartford L. & A. Ins. Co.*, 56 Conn. 116. See, also, *Grand Lodge, A. O. U. W., v. McKinstry*, 57 Mo. App. 82; *Hosmer v. Welch*, 107 Mich. 470, 65 N. W. 280, 67 N. W. 504.

⁶⁸ *Scott v. Dickson*, 108 Pa. St. 6; *Embry's Adm'r v. Harris* (Ky.), 52 S. W. 958.

CHAPTER X.

THE PREMIUM.

§ 128-130. Definition and Necessity.

131. Conditions of Policy Regulating Payment.

132. Manner of Payment.

133. Notice of Premium Falling Due.

134. Tender.

135. Waiver of Nonpayment

DEFINITION AND NECESSITY.

§ 128. The premium is the consideration for which the insurer assumes the risk.

It is one of the essentials of a contract of insurance, and must be agreed upon between the insurer and the insured before the contract is complete. (§ 17.)

§ 129. Prepayment of the premium is not necessary to the consummation of a contract of insurance unless made so by agreement; but a risk will not attach until the premium has been paid or a liability to pay it to the insurer has been incurred. (§§ 40, 109.)

§ 130. In the absence of a stipulation to the contrary, the presumption is that the delivery of the policy, the attaching of the risk and liability, and the payment of the premium are coincident. (§§ 40, 41.)

Generally.

Every legal and enforceable contract must be based upon a valuable consideration. This consideration, in an insurance contract, is called the premium. The contract is not complete until the amount of the premium has been agreed upon—until the minds of the parties have met upon the amount which the insurer is to receive for undertaking the risk. The agreement is not complete or enforceable until the

obligation of both parties is certain and definite, so that the agreement as made can be enforced by either party. Both must be bound—the one to insure, and the other to pay the premium.

If any essentials of the contract are left open or undetermined, no contract has been made, and the insurer is not liable for a loss occurring, nor the insured to pay the premium. If the agreement and understanding concerning the essentials are not mutual, i. e. if one party understands the contract one way and the other party another, no contract has been made which can be enforced either in law or equity.

The contract of the insurer is executory. On the part of the insured, so far as concerns the premium, the contract may be executed, as where the premium is paid, or executory, as where a promise has been made to pay it. If an insured pays a premium in anticipation of a contract to be made, which the insurer subsequently refuses to make, the former is entitled to a return of his premium. The insurer is not allowed to receive or retain the premium where no risk has attached, for in such case it has furnished no equivalent for the premium; and it is equally true that the payment of the premium, or a liability to pay the same, must always exist on the part of the insured, where the insurers are responsible for the risk.¹

¹ *Hartshorn v. Shoe & Leather Dealers' Ins. Co.*, 15 Gray (Mass.), 244; *Fish v. Cottenet*, 44 N. Y. 538; *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305, 28 N. Y. 153; *Walker v. Metropolitan Ins. Co.*, 56 Me. 371; *Orient Mut. Ins. Co. v. Wright*, 23 How. (U. S.) 401. See ante, § 17, "Essentials of Contract;" §§ 40-46, "Making of Contract." If an insurer avoids a policy because it has been obtained through misrepresentation or fraud, the contract becomes void ab initio, and the insurer cannot enforce the obligation of the insured to pay the premium, *Schreiber v. German-American Hail Ins. Co.*, 43 Minn. 369; at least unless there be a

CONDITIONS OF POLICY REGULATING PAYMENT.

§ 131. Conditions in a policy regulating the time and manner of payment of the premium are valid and of the essence of the contract, and must be complied with unless waived.

When a policy of insurance has been delivered and accepted, it becomes, in the absence of fraud, conclusive evidence of the contract of the parties, and its stipulations regulating the time or manner, or place of payment of the premiums become binding on both parties. After accepting a policy the insured will not be heard to deny knowledge of its conditions. And so, when a policy contains a provision that it shall not be binding or effective until the premium has actually been paid, pre-payment of the premium becomes a condition precedent to the attaching of any liability on the part of the insurer. This condition, being imposed for the benefit of the insurer, may be waived by any of its authorized officers or agents. Whether an agent or officer has power to waive the conditions of the policy in this respect must be determined from the circumstances of a given case. The insurer can, by its contract, limit the power of waiver to certain specified officers.²

stipulation in the policy allowing the insurer to retain the premium even though it elects to avoid the policy, *Id.* The payment of the first premium, or the obligation to pay it, is necessary to the inception of the risk, but an insured is not bound to renew the policy, or to pay future premiums to keep it alive, unless he has obligated himself so to do. *Gibson v. Megrew*, 154 Ind. 273, 56 N. E. 674, 48 L. R. A. 362. The contract of a member of a mutual benefit association is purely unilateral, and he may refuse to continue his payments at any time, in which event the association can only declare his interest forfeited, and cannot sue for unpaid assessments. *Rockhold v. Canton M. Mut. Benev. Soc.*, 129 Ill. 440; *Lehman v. Clark*, 174 Ill. 279.

² *Wilkins v. State Ins. Co.*, 43 Minn. 177. Where a policy expressly provides that a premium shall be paid on or before a certain day, and in default thereof the policy shall be void, nonpayment of the

The parties to an insurance contract have the right to insert such lawful conditions as they may agree upon concerning the obligations of each, and a contract when made must be construed and enforced according to the expressed intention of the parties. It is not unlawful to provide in the contract that upon certain conditions or contingencies it shall become void.³

An express provision in a policy that the company shall not be liable until the premium be actually paid, is waived by an unconditional delivery of the policy to the insured as a completed and executed contract, under an express or implied agreement that credit be given for the premium,⁴ provided the delivery and waiver be acts of one authorized to bind the insurer in those particulars. Provisions of the policy for the release of the insurer from liability on a failure of the insured to pay the premiums when due, are of the very essence and substance of the contract. To hold the company to its promise to pay the insurance, notwithstanding the default of the insured in making payment of the premiums as

premium upon the day named works a forfeiture. *Fowler v. Metropolitan Life Ins. Co.*, 116 N. Y. 389.

³ *Holman v. Continental Life Ins. Co.*, 54 Conn. 195; *Northwestern Mut. Life Ins. Co. v. Hazelett*, 105 Ind. 212; *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341; *Bosworth v. Western Mut. Aid Soc.*, 75 Iowa, 582; ante, c. 8.

⁴ *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; *Brownfield v. Phoenix Ins. Co.*, 35 Mo. App. 54. But this waiver must be by some one authorized to bind the insurer in the premises. *Wilkins v. State Ins. Co.*, 43 Minn. 177; *Miller v. Union Cent. Life Ins. Co.*, 110 Ill. 102; *Condon v. Mutual Reserve Life Fund Ass'n*, 89 Md. 99, 42 Atl. 944, 44 L. R. A. 149; *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117; *Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. 279; *Babcock v. Baker*, 37 App. Div. (N. Y.) 558. The waiver may take place after a loss has occurred. *Schoneman v. Western Horse & Cattle Ins. Co.*, 16 Neb. 404; ante, c. 8.

stipulated, is to destroy the very essence of the contract, and this a court cannot do.⁵

MANNER OF PAYMENT.

§ 132. A premium is ordinarily payable in cash only. Credit can usually be given by an agent for premiums on fire insurance policies.

The premium is ordinarily payable in cash, and a local agent has no implied authority to accept or to agree to take anything less in payment for the premium due upon the policy.⁶

It is an elementary principle of agency that whatever an agent does can be done only in the way usual in the line of business in which he is acting. The taking of a horse by an agent, as payment of a premium due the company, is beyond his powers, and a fraud as respects the company, and does not constitute a consideration necessary to create a valid contract,⁷ but it may be otherwise where the agent is a general state agent, and the transaction takes place within his territory and he has an interest in the premiums.⁸ So an agent may sometimes give the insured credit for the premiums, and substitute himself as debtor to the company.⁹ The agree-

⁵ Klein v. New York Life Ins. Co., 104 U. S. 88.

⁶ Lycoming Fire Ins. Co. v. Ward, 90 Ill. 545; Raub v. New York Life Ins. Co., 14 N. Y. St. Rep. 573. But payment may be made by check, Kenyon v. Knights Templar & M. Mut. Aid Ass'n, 122 N. Y. 247, 25 N. E. 302; Maher v. Hibernia Ins. Co., 67 N. Y. 283; or by draft, Piedmont & A. Life Ins. Co. v. Ray, 50 Tex. 511; ante, c. 8.

⁷ Hoffman v. John Hancock Mut. Life Ins. Co., 92 U. S. 161.

⁸ Van Werden v. Equitable Life Assur. Soc., 99 Iowa, 621, 68 N. W. 892.

⁹ Sheldon v. Connecticut Mut. Life Ins. Co., 25 Conn. 207; Chickering v. Globe Mut. Life Ins. Co., 116 Mass. 321; Slobodisky v. Phenix Ins. Co., 53 Neb. 816, 74 N. W. 271. See, also, Buffum v. Fayette Mut. Fire Ins. Co., 3 Allen (Mass.), 360; Kentucky Mut. Ins. Co. v. Jenks, 5 Ind. 96; Schwartz v. Germania Life Ins. Co., 18

ment of an agent to accept payment of the premium in professional services rendered by the insured, is void.¹⁰ So an agreement of the agent to set off debts due between himself and the policy holder, and the issuance of a receipt in evidence of such an agreement, does not bind the company.¹¹ Payment cannot be made by the delivery of commodities to the agent where the policy provides for a cash premium.¹²

An insurer has been held estopped to claim non-payment of a premium, when its agent has charged the broker who procured the policy with the amount of the premium.¹³ Where a policy provides that it shall not be valid until the first premium be paid, but specifies no special mode of payment, a delivery of the policy with a receipt for the first year's premium attached, in exchange for defendant's notes for the amount of the premium, will be deemed in law an agreement to accept, and an acceptance of the notes in payment of the premium.¹⁴ The agent may advance the premium to the company, and take the note of the assured for the amount to himself, and this will be a sufficient compliance with the condition requiring the premium to be paid before the company shall be liable.¹⁵ Where an insurer receives an order of an

Minn. 448; *Pendleton v. Knickerbocker Life Ins. Co.*, 5 Fed. 238; *Pierce v. Charter Oak Life Ins. Co.*, 138 Mass. 151; *Clark v. Metropolitan Life Ins. Co.*, 107 Mich. 160, 65 N. W. 1.

¹⁰ *Anchor Life Ins. Co. v. Pease*, 44 How. Pr. (N. Y.) 385; *Texas Mut. Life Ins. Co. v. Davidge*, 51 Tex. 244.

¹¹ *Barnes v. Piedmont & A. Life Ins. Co.*, 74 N. C. 22.

¹² *Cyrenius v. Mutual Life Ins. Co.*, 18 App. Div. 599, 46 N. Y. Supp. 549. See, also, §§ 109, 110, on power of agents to receive premium.

¹³ *Elkins v. Susquehanna Mut. Fire Ins. Co.*, 113 Pa. St. 386; *Lebanon Mut. Ins. Co. v. Hoover*, 113 Pa. St. 591.

¹⁴ *Taylor v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390; *Union Cent. Life Ins. Co. v. Taggart*, 55 Minn. 95.

¹⁵ *Home Ins. Co. v. Curtis*, 32 Mich. 402; *Krause v. Equitable Life Assur. Soc.*, 99 Mich. 461, 58 N. W. 496; *Shields v. Equitable Life Assur. Soc. (Mich.)*, 80 N. W. 793.

employe upon his employer as payment for the premium, advantage cannot be taken of a condition forfeiting the policy for non-payment unless notice be given the insured of the failure of the drawee to make the payments mentioned in the order.¹⁶ But an order is not, ordinarily, a payment until cashed.¹⁷ When an order is accepted by an insurer, it must be presented within a reasonable time.¹⁸

A check may be received as payment, but in the absence of previous dealings the presumption will be that its acceptance was conditioned upon its being paid when presented.¹⁹ Payment must be made to some party authorized to receive the premium, and if payment be, by the policy, required to be made at a particular place, the payment must be made at the place designated. Where a policy fixes no place of payment of premium, and names no person to whom it must be paid, parol evidence is admissible to show the agreement between the insured and the agent effecting the insurance, as to the place of payment.²⁰ The agent who delivers the policy is presumptively entitled to receive payment of the initial premium.²¹ The failure of a broker who delivers the policy and receives the premium, to pay it over to the insurer, does not affect the validity of the policy.²²

¹⁶ *Lyon v. Travelers' Ins. Co.*, 55 Mich. 141; *National Ben. Ass'n v. Jackson*, 114 Ill. 533.

¹⁷ *McMahon v. Travelers' Ins. Co.*, 77 Iowa, 229.

¹⁸ *Cotten v. Fidelity & Casualty Co.*, 41 Fed. 506. See, also, effect of orders of payment, *Bane v. Travelers' Ins. Co.*, 85 Ky. 677; *Forest City Ins. Co. v. School Directors of Dist. No. 1*, 4 Ill. App. 145.

¹⁹ *Greenwich Ins. Co. v. Oregon Imp. Co.*, 76 Hun, 194, 58 N. Y. St. Rep. 474.

²⁰ *Blackerby v. Continental Ins. Co.*, 83 Ky. 574.

²¹ *Scott v. Home Ins. Co.*, 53 Wis. 238; *Lycoming Fire Ins. Co. v. Ward*, 90 Ill. 545; *Whitley v. Piedmont & A. Life Ins. Co.*, 71 N. C. 480. See ante, c. 8, "Agents."

²² *Gaysville Mfg. Co. v. Phoenix Mut. Fire Ins. Co.*, 67 N. H. 457, 36 Atl. 367.

There is no presumption that an agent who accepts a note for an insurer has power to receive payment of the note at its maturity, unless the note be in his possession at the time of payment.²³ Where no place of payment is specified in the policy, payment made to any authorized agent is sufficient. But if payment be, by the policy, required at a specified place, as, for instance, the home office, the condition must be complied with unless waived by the insurer.²⁴

The premium must be paid by the insured or by some one authorized to act for him, or on his behalf, except in cases where the contract recognizes such rights in third parties as gives them an interest in the continuance of the policy, and justifies their paying the premiums to keep it alive. Where a policy of life insurance provided that it should not take effect unless the premium were paid during the lifetime of the insured, a payment of the premium by a third person after death of the insured, as by his administrator or beneficiary, does not give life to the contract. As the contract cannot be created without the consent of the contracting parties, so it cannot be given effect or continued in existence by the act of an intermeddler.²⁵

The beneficiary of a certificate of insurance on the life of her father who is insane or incapable of attending to business, is entitled to notice of his default in paying assessments before a forfeiture can be declared therefor, after she has given notice to the company of his condition, and requested a notice of default, so that she might pay the assessments if he did

²³ Long Creek Bldg. Ass'n v. State Ins. Co., 29 Or. 569, 46 Pac. 366.

²⁴ Thwing v. Great Western Ins. Co., 111 Mass. 93; Williams v. Washington Life Ins. Co., 31 Iowa, 541; O'Reilly v. Guardian Mut. Life Ins. Co., 60 N. Y. 169; Bulger v. Washington Life Ins. Co., 63 Ga. 328.

²⁵ Whiting v. Massachusetts Mut. Life Ins. Co., 129 Mass. 240.

not.²⁶ The beneficiary in a policy has such relation to the contracting parties, and such an interest in the maintenance of the policy, as entitles him to pay the premium.²⁷ The widow and children of an insured are entitled to make payment of a note given by the deceased husband and father, to keep alive insurance on the homestead.²⁸

Giving Credit for Premium.

Except when prohibited by the terms of the contract an insurance agent who has power to receive applications, make contracts, and deliver the policies, is presumed to have authority to waive pre-payment of the premium, and to give credit therefor. And even when the policy contains a provision that it shall not go into effect until the initial premium is paid, but contains no special limitation upon the power of the agent to waive pre-payment, it is held that the delivery of the policy without pre-payment of the premium, will give rise to a presumption of an intention to have the policy take effect at once. The recital of the payment of the premium

²⁶ *Buchannan v. Supreme Conclave, I. O. H.*, 178 Pa. St. 465, 34 L. R. A. 436.

²⁷ *Hamill v. Supreme Council of R. A.*, 152 Pa. St. 537. In *Matthews v. American Cent. Ins. Co.*, 154 N. Y. 449, it was held that in a case of loss by fire after the death of the original insured, and before the appointment of a legal representative, those interested in the policy must make reasonable efforts, and see that the covenants as to notice and proofs of loss are kept, and use such agencies as the law provides to secure that result.

²⁸ *Continental Ins. Co. v. Daly*, 33 Kan. 601. See, also, as to payments made by third parties, *Miller v. Union Cent. Life Ins. Co.*, 110 Ill. 102; *Union Mut. Life Ins. Co. v. McMillen*, 24 Ohio St. 67; *Garner v. Germania Life Ins. Co.*, 110 N. Y. 266; *Swift v. Railway Passenger & F. C. Mut. Aid & Ben. Ass'n*, 96 Ill. 309; *Hodge v. Ellis*, 76 Ga. 272; *Gould v. Emerson*, 99 Mass. 154; *National Mut. Aid Soc. v. Lupold*, 101 Pa. St. 111. A mortgagee, for whose benefit a mortgagor has contracted to carry insurance on the mortgaged property, is entitled to pay the premiums necessary to keep the policy in

in a policy is *prima facie* evidence that it has been paid. If the premiums have not been in fact paid, yet the policy has been delivered to the insured without pre-payment, and credit given, it will be held to be in force, subject to the right of the insurer to cancel after giving the necessary notice.²⁹ But a provision in a policy that "no insurance shall be considered as binding until actual payment of the premium, and no part of this contract can be waived except in writing, signed by the secretary of the company," is notice to the insured that an agent has no authority to waive pre-payment of the premium. And a delivery of a policy containing such a condition will not bind the insurer unless the premium be actually paid, or the condition be waived by the secretary or some superior power.³⁰ And where a policy is delivered with the understanding that the premium is to be paid in cash and at once, the mere receipt of the policy, even though it contain acknowledgment of payment of the premium, does not estop the insurer from asserting and proving non-payment, as against a mortgagee to whom loss if any is payable, although he received the policy which acknowledged receipt of the premium from the assured, without notice that the premium was unpaid.³¹ Whether or not it was intended that the policy should go into

force, and can charge amounts paid therefor as a part of the mortgage debt. *St. Paul F. & M. Ins. Co. v. Upton*, 2 N. D. 229, 50 N. W. 702; *Overby v. Fayetteville B. & L. Ass'n*, 81 N. C. 56. And in such case the mortgagee must account to the mortgagor for the benefit of any insurance collected. *Pendleton v. Elliott*, 67 Mich. 496; *Johnson v. Horsford*, 110 Ind. 572; *Nordyke & M. Co. v. Gery*, 112 Ind. 535, 13 N. E. 683.

²⁹ *John R. Davis Lumber Co. v. Home Ins. Co.*, 95 Wis. 542, 70 N. W. 59; *Mallory v. Ohio Farmers' Ins. Co.*, 90 Mich. 112, 51 N. W. 188; *Stewart v. Union Mut. Life Ins. Co.*, 155 N. Y. 257, 42 L. R. A. 148.

³⁰ *Wilkins v. State Ins. Co.*, 43 Minn. 178.

³¹ *Union Bldg. Ass'n v. Rockford Ins. Co.*, 83 Iowa, 647.

effect without pre-payment of the premium, and that credit should be given therefor, is often a question of fact to be determined by a jury.³²

The Effect of Taking a Note for Premium.

While it is true, as a general rule, that a promissory note is not payment of a debt which it represents, until the note is itself paid, yet it becomes a payment of the debt when the parties by express stipulation so agree. The acknowledgment of payment in the policy is always open to explanation by proof of the actual facts. Though such acknowledgment in the policy would tend to show that it was the intention of the parties that a promissory note, given for the premium, was intended to be taken as payment, it can always be shown, to defeat the inference, that such was not the intention of the parties. It only, in effect, changes the burden of proof in such cases.³³

The application and the note given for the policy, if executed as part of the same contract, are to be considered together in order to determine what the contract was.³⁴ When a note is accepted as payment of the premium, the non-payment of the note at maturity does not affect the policy, or release the insurer, unless that effect be expressly stipulated for.³⁵ Where a policy is conditioned to be void on failure

³² Church v. La Fayette Fire Ins. Co., 66 N. Y. 222. Where a policy is prepared and forwarded to a general agent to be delivered by him, and he to receive payment of fees and premium, of which no part went to the insurer, the latter cannot complain of the giving of credit. Pythian Life Ass'n v. Preston, 47 Neb. 374, 66 N. W. 445.

³³ Pitt v. Berkshire Life Ins. Co., 100 Mass. 502; Massachusetts Ben. Life Ass'n v. Robinson, 104 Ga. 256.

³⁴ McAllister v. New England Mut. Life Ins. Co., 101 Mass. 561; Beezley v. Des Moines Life Ass'n, 100 Iowa, 436, 69 N. W. 549.

³⁵ Union Cent. Life Ins. Co. v. Taggart, 55 Minn. 95; Trade Ins. Co. v. Barracliff, 45 N. J. Law, 543.

to pay "any notes or other obligations given for premium," and recites a consideration of a certain sum in hand paid, and annual premiums for a like amount, and part of the payment was in cash, and a note had been given for the balance, the note providing that if not paid when due the policy should be void in accordance with the conditions of the policy, it is held that the policy is forfeited by failure to pay the note at maturity.³⁶ A provision in the note that upon its non-payment at maturity the insurer shall have the right to cancel the policy, does not release the insurer *per se*, but merely gives the insurer a right which it can exercise or not at its option.³⁷ But a provision in a premium note that if it is not paid at maturity the entire premium shall be considered earned, and the policy shall be null and void so long as the note remains overdue and unpaid, is valid and binding, and the policy is unenforceable if the note is not paid at maturity or prior to the loss.³⁸

The taking of notes, at the time of the issue of the policy, in lieu of quarterly instalments of annual premium, does not waive a provision of the policy rendering it void for failure to pay the subsequent instalments as they become due.³⁹

³⁶ *Pitt v. Berkshire Life Ins. Co.*, 100 Mass. 500; *How v. Union Mut. Life Ins. Co.*, 80 N. Y. 32.

³⁷ *Western Horse & Cattle Ins. Co. v. Scheidle*, 18 Neb. 495.

³⁸ *New Zealand Ins. Co. v. Maaz*, 13 Colo. App. 493, 59 Pac. 213; *Garlick v. Mississippi Valley Ins. Co.*, 44 Iowa, 553; *American Ins. Co. v. Stoy*, 41 Mich. 385; *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696.

³⁹ *Beezley v. Des Moines Life Ass'n*, 100 Iowa, 436, 69 N. W. 549. A forfeiture of a policy, assented to by the insured, for nonpayment of a note for advance premiums, prevents the recovery of any part of the note, although the company might otherwise have enforced the note, and the insured might have paid the premium, and continued the policy in force. *Skillern v. Continental Ins. Co. (Tenn.)*, 42 S. W. 180.

Where an insurer avoids a policy for fraud or misrepresentation, the consideration for the premium note fails. A stipulation that in case the policy shall become void from the happening of a particular event, the whole premium, paid or unpaid, for the entire term shall be deemed earned, gives the insurer the right to retain the paid-up premium, and to collect the unpaid premium, for the benefit of the insurance which the insured has had up to the time of the specified event, is a sufficient equivalent for the premium, paid and unpaid.⁴⁰ An agreement that the premium note of the insured shall remain binding upon him although the insurer is relieved from liability, is not illegal or contrary to public policy.⁴¹

That a premium note has not been paid at the time a loss occurred, does not defeat a recovery, where a note has not matured at the time of the loss, and the policy merely provides that it shall be suspended, and of no force and effect during the time the premium note, or any part thereof, remains overdue and unpaid.⁴²

Forfeitures of a policy which has once gone into effect are not favored, and will not be allowed to release the insurer

⁴⁰ *Schreiber v. German-American Hail Ins. Co.*, 43 Minn. 368.

⁴¹ *St. Paul F. & M. Ins. Co. v. Coleman*, 6 Dak. 458, 6 L. R. A. 87; *Caufield v. Continental Ins. Co.*, 47 Mich. 447; *Minnesota Farmers' Mut. Fire Ass'n v. Olson*, 43 Minn. 21. Negotiable promissory notes, which purport on their face to be premiums, and stipulate that the policy becomes void if they are not paid at maturity, are not per se a payment of the premium, so as to avoid the policy, rendering it void if premium notes are not paid when due. *Forbes v. Union Cent. Life Ins. Co.*, 151 Ind. 89, 51 N. E. 84; *German American Ins. Co. v. Divilbiss*, 67 Mo. App. 500. Stipulations that the company shall not be liable while the premium note remains unpaid will be recognized. *Robinson v. Continental Ins. Co.*, 76 Mich. 641, 6 L. R. A. 95; *Fowler v. Metropolitan Life Ins. Co.*, 116 N. Y. 389.

⁴² *Farmers' & Merchants' Ins. Co. v. Wiard* (Neb.), 81 N. W. 319

from liability, unless such a result be clearly stipulated for.⁴³ But a provision avoiding the policy for non-payment of premium or assessments within a certain time, is certain and unambiguous, and cannot be construed to merely give the insurer the right to avoid the policy,⁴⁴ and are binding upon the beneficiary.⁴⁵ A policy which provides for one month of grace after the premium becomes due, cannot be forfeited for non-payment of premium, unless the insured survives the month.⁴⁶ It has sometimes been held that the stipulation for forfeiture in the note is nugatory, and that a forfeiture can only be based upon an express provision of the policy itself.⁴⁷

Defenses to Premium Notes.

It is no defense to an action on a premium note that during the continuance of a default of the insured the policy was temporarily suspended, and the insurer would not be liable for a loss happening during such default;⁴⁸ nor that the insurer, if a foreign corporation, has not strictly complied with the law authorizing it to do business within the state, if there has been a substantial compliance with the law;⁴⁹ nor that the insured, who was able to read, did not read the note before signing it.⁵⁰

⁴³ *Massachusetts Ben. Life Ass'n v. Robinson*, 104 Ga. 256, 30 S. E. 918; *McMaster v. New York Life Ins. Co.*, 90 Fed. 40; *Ohio Farmers' Ins. Co. v. Stowman*, 16 Ind. App. 205, 44 N. E. 558, 940; *Hanover Fire Ins. Co. v. Dole*, 20 Ind. App. 333, 50 N. E. 772; *Grand Lodge, A. O. U. W., v. Bagley*, 164 Ill. 340.

⁴⁴ *Bowworth v. Western Mut. Aid Soc.*, 75 Iowa, 582.

⁴⁵ *Forbes v. Union Cent. Life Ins. Co.*, 151 Ind. 89, 51 N. E. 84.

⁴⁶ *McMaster v. New York Life Ins. Co.*, 90 Fed. 40.

⁴⁷ *Dwelling House Ins. Co. v. Hardie*, 37 Kan. 674.

⁴⁸ *American Ins. Co. v. Henley*, 60 Ind. 515; *American Ins. Co. v. Charles*, 62 Ind. 210.

⁴⁹ *American Ins. Co. v. Butler*, 70 Ind. 1; *American Ins. Co. v. Pressell*, 78 Ind. 442.

⁵⁰ *American Ins. Co. v. McWhorter*, 78 Ind. 136.

It is no defense to a premium note, in the hand of an innocent purchaser for value, before maturity, that the company which issued the policy for which the note was given, has failed;⁵¹ nor that the insurer had failed to comply with a contemporaneous parol agreement;⁵² nor that by the terms of the policy it was provided that the insurer might cancel the policy and return the premium for the unexpired term *pro rata*, and that on failure to pay the note at maturity the policy should be void until revived by payment, but that the whole amount due should be considered earned;⁵³ nor that the insurer failed to show that it was empowered to do business in the state where the contract was made;⁵⁴ nor that the act which gave the company power to insure was unconstitutional, nor that the contract was *ultra vires*, by reason of want of power to insure.⁵⁵

Payment of Premium after Loss.

If the contract has been completed before a loss occurs, and credit has been expressly or impliedly given for the premium, payment made after loss is sufficient. If the loss has occurred before the contract is made the insurer is not bound, for insurance is against anticipated perils and events, and not against those which have already happened.⁵⁶

If the loss occurs during a temporary suspension of the policy for non-payment of the premium, or before the policy by its terms has become effective because the initial premium

⁵¹ Union Ins. Co. v. Greenleaf, 64 Me. 123.

⁵² Life Ass'n of America v. Cravens, 60 Mo. 388.

⁵³ Caufield v. Continental Ins. Co., 47 Mich. 447; American Ins. Co. v. Klink, 65 Mo. 78.

⁵⁴ American Ins. Co. v. Smith, 73 Mo. 368; Cassaday v. American Ins. Co., 72 Ind. 95; Union Ins. Co. v. Smart, 60 N. H. 458; Fidelity & Casualty Co. v. Eickhoff, 63 Minn. 170.

⁵⁵ Freeland v. Pennsylvania Cent. Ins. Co., 94 Pa. St. 504.

⁵⁶ Wales v. New York Bowery Fire Ins. Co., 37 Minn. 106.

is not paid, the insurer will not be liable.⁵⁷ If a policy provides that it shall not be effective until the advance premium is paid during the lifetime of the person insured, a payment of such premium by a third person, without the knowledge of the insured, is of no effect, although paid with his money, and his administrator cannot ratify the act.⁵⁸ The payment of a premium after a loss has occurred, without disclosing the loss, is not a fraud, as the insured owes the company no duty to disclose the loss before paying, provided the contract was in force at the time the loss occurred.⁵⁹

NOTICE OF PREMIUM FALLING DUE.

§ 133. Notice need not be given of the falling due of premiums unless required by the contract or by statute.

An insurer is not bound to notify an insured of the time when the premiums or premium notes will become due, unless either by contract or by-law such notice is required to be given, or unless the insurer has specially agreed to give such notice before it will claim a forfeiture. Instructions by an insurer that premiums must be paid at its home office, and that due notice will be given of the date when payment must be made, will prevent a forfeiture for non-payment of the premium, until such notice has been given. An insurer will not be allowed to take advantage of any non-payment caused by its own misrepresentations or conduct, which have induced the insured to delay payment.⁶⁰ Where the insurer

⁵⁷ Cases *supra*; *Wall v. Home Ins. Co.*, 36 N. Y. 157; *Matthews v. American Ins. Co.*, 40 Ohio St. 135.

⁵⁸ *Whiting v. Massachusetts Mut. Life Ins. Co.*, 129 Mass. 240.

⁵⁹ *Firemen's Ins. Co. v. Kuessner*, 164 Ill. 275. See, also, *Burner's Adm'r v. German-American Ins. Co. (Ky.)*, 27 Ins. Law J. 732, 45 S. W. 109; *Milkman v. United Mut. Ins. Co.*, 20 R. I. 10, 36 Atl. 1121.

⁶⁰ *Heinlein v. Imperial Life Ins. Co.*, 101 Mich. 250, 25 L. R. A. 627; *Colby v. Life Ind. & Inv. Co.*, 57 Minn. 510.

has undertaken, or is obligated to give notice, it cannot claim a forfeiture without showing that it has given the notice required, in the proper manner, and at the proper time.⁶¹ Usage on the part of the insurance company, of the giving notice of the day of payment, and the reliance of the assured upon such notice, is no excuse for non-payment.⁶² In some states the legislature has interfered on behalf of the insured, and has by statute prevented a literal enforcement of the policy forfeiting the rights of the insured for non-payment of premiums upon the due-day, and required that when a premium becomes due notice must be given, and a specified time allowed in which to pay, before the policy can be forfeited for non-payment of premium. The provisions of a statute, making the serving of the notice a condition precedent to the forfeiting of the policy, cannot be superseded by the contract of the parties.⁶³ But such law, while controlling the rights of the insurer to forfeit the policy of insured, does not destroy the rights of the contracting parties to agree to abandon the contract.⁶⁴

⁶¹ *Covenant Mut. Ben. Ass'n v. Spies*, 114 Ill. 463; *Wolf v. Michigan Masonic Mut. Ben. Ass'n*, 108 Mich. 665, 66 N. W. 576; *Goodwin v. Provident Sav. Life Assur. Ass'n*, 97 Iowa, 226, 66 N. W. 157, 32 L. R. A. 473; *Benedict v. Grand Lodge, A. O. U. W.*, 48 Minn. 471; *Shelden v. National Masonic Acc. Ass'n*, 122 Mich. 403, 81 N. W. 266.

⁶² *Thompson v. Knickerbocker Life Ins. Co.*, 104 U. S. 252; *Mandego v. Centennial Mut. Life Ass'n*, 64 Iowa, 134.

⁶³ *Baxter v. Brooklyn Life Ins. Co.*, 119 N. Y. 450; *Laws N. Y. 1877*, c. 321; *Laws N. Y. 1892*, c. 690, § 92; *Equitable Life Assur. Soc. v. Trimble (C. C. A.)*, 83 Fed. 85; *Nall v. Provident Sav. Life Assur. Soc. (Tenn. Ch. App.)*, 54 S. W. 109. For construction of this New York statute, see *Banholzer v. New York Life Ins. Co.*, 74 Minn. 387, 77 N. W. 295; *Trimble v. New York Life Ins. Co.*, 20 Wash. 386, 55 Pac. 429; *Rosenplanter v. Provident Sav. Life Assur. Soc. (C. C. A.)*, 96 Fed. 721, 46 L. R. A. 473.

⁶⁴ *Mutual Life Ins. Co. v. Hill*, 178 U. S. 347.

Nonforfeitable Policies.

Some policies contain a provision that if, after they have been kept alive a designated time, or until after a certain number of premiums have been paid, they should lapse by reason of non-payment of premium, then the risk will be carried by the insurer for a given time, notwithstanding the failure to pay the premium stipulated for; or the insured may, at his option, upon surrender of the policy, obtain a new one for a sum proportioned to the amount of premiums which have been paid. Such policies are termed non-forfeitable. They are written upon the theory that the premium paid is more than sufficient to carry yearly or term insurance, and that there is in the hands of the insurer at the time of failure to pay the premium a surplus to the benefit of which the insured is entitled. In effect it enables him to participate in the profits of the business of the insurer. In many states this subject is regulated by statute.⁶⁵

Upon familiar principles of law the statutes of a state enter into and become a part of every contract made within a state, or which is to be construed as a contract of that state. They are neither retroactive nor retrospective, nor can their repeal affect contracts made subject to them.⁶⁶ The provisions of such statute are intended for the benefit of the insured, and may be waived by him. Thus, a termination of a life insurance policy by mutual agreement after defaulting in payment of premiums, and the refusal of the insured to continue the policy, is conclusive against the insured, not-

⁶⁵ Deering's Ann. Civ. Code Cal. § 2766; 1 Mill's Stat. Colo. 1891, § 2223; Rev. St. Me. 1883, p. 460, § 91; Pub. Laws Me. 1887, c. 71; How. Ann. St. Mich. 1882, § 4232; St. Mass. 1880, c. 232, § 6; Id. 1882, c. 119, §§ 159-160; Id. 1887, c. 214, § 76; 3 Rev. St. N. Y. (8th Ed.) p. 1688.

⁶⁶ McDonnell v. Alabama G. L. Ins. Co., 85 Ala. 401; Hope Mut. Ins. Co. v. Flynn, 38 Mo. 483, 90 Am. Dec. 438; ante, §§ 55, 68.

withstanding the statutory provision precluding a forfeiture.⁶⁷

The precise nature of the rights of the insured, and the liability of the insurer, must vary according to the conditions of the contract, and statute under which it is made.⁶⁸

The Return of the Premium.

As we have seen, the consideration for the premium is the attaching of the risk, and the insurance afforded. When for any reason the contract has not been consummated, or a risk never attaches, or the policy is void, there is no consider-

⁶⁷ *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327; *Mutual Life Ins. Co. v. Sears*, 178 U. S. 345; *Mutual Life Ins. Co. v. Hill*, 178 U. S. 347; *Mutual Life Ins. Co. v. Allen*, 178 U. S. 351.

⁶⁸ In *Carter v. John Hancock Mut. Life Ins. Co.*, 127 Mass. 153, the court said: "The purpose of the statute is merely to establish a rule which shall enable the assured to reap the full benefit of premiums paid before default on his part, and, at the same time, to secure to the insurance company, in case it is obliged to pay, the full amount of the premiums which the terms of the policy call for. It is not the purpose of the statute to make a new contract between the parties, nor to make any change in the time when the amount of the policy becomes payable. * * * The premium provided for by the policy is fixed with reference to the endowment feature, and is, of course, much larger than is paid for a pure life policy, when the age of the assured is such that his expectation of life is largely in excess of the period at the end of which the amount of the policy is made payable."

The making of a default, and the conversion of the policy from an annual premium policy to a paid-up policy, is at the option of the insured. *Lovell v. St. Louis Mut. Life Ins. Co.*, 111 U. S. 264. This right to exercise the option is lost by the surrender of the policy. *Meyer v. Manhattan Life Ins. Co.*, 144 Ind. 439, 43 N. E. 448; *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327.

For construction of policies containing this feature, see, also, *Lewis v. Penn Mut. Life Ins. Co.*, 3 Mo. App. 372; *Chase v. Phoenix Mut. Life Ins. Co.*, 67 Me. 85; *Hamilton v. Mutual Ben. Life Ins. Co.*, 109 Ga. 381, 34 S. E. 593; *Matlack v. Mutual Life Ins. Co.*, 180 Pa. St. 360, 36 Atl. 1082; *Sheerer v. Manhattan Life Ins. Co.*, 20 Fed. 886; *Smith v. National Life Ins. Co.*, 103 Pa. St. 177; *McConnell v.*

ation to sustain the payment of the premium, and if paid it must be returned. If unpaid it cannot be collected.⁶⁹

Thus if a policy upon which premiums have been paid is void because of misconduct on the part of the agent procuring it, without fault on the part of the applicant, the company is liable for the return of the premiums which have been paid.⁷⁰ So if the risk did not attach because the sole ownership of the insured property was not in the insured;⁷¹ or if the insurer, by virtue of a condition of the policy, exercises the right given him to avoid it *in toto*, and from the beginning;⁷² or if the contract was conditional, and never became in force or effect.⁷³ But an insured cannot recover back the premium when the policy is void because of fraudulent misrepresentations or concealment on his part;⁷⁴ nor if the contract be illegal in its inception, if the parties are *in pari delicto*.⁷⁵ An infant cannot recover premiums paid for insurance upon his own life when the contract is fair and reasonable and free from fraud or bad faith on the part of the

Provident Sav. Life Assur. Soc. (C. C. A.), 92 Fed. 769; Omaha Nat. Bank v. Mutual Ben. Life Ins. Co., 81 Fed. 935; McMaster v. New York Life Ins. Co., 78 Fed. 33.

⁶⁹ Schreiber v. German-American Hail Ins. Co., 43 Minn. 367; Waller v. Northern Assur. Co., 64 Iowa, 101; McCutcheon v. Rivers, 68 Mo. 122; Prentice v. Knickerbocker Life Ins. Co., 77 N. Y. 483; United States Life Ins. Co. v. Wright, 33 Ohio St. 533; Abell v. Penn Mut. Life Ins. Co., 18 W. Va. 400.

⁷⁰ New York Life Ins. Co. v. Fletcher, 117 U. S. 519.

⁷¹ Waller v. Northern Assur. Co., 64 Iowa, 101.

⁷² Schreiber v. German-American Hail Ins. Co., 43 Minn. 367.

⁷³ Harnickell v. New York Life Ins. Co., 40 Hun (N. Y.), 558.

⁷⁴ Aetna Life Ins. Co. v. Paul, 10 Ill. App. 431; Fisher v. Metropolitan Life Ins. Co., 162 Mass. 236.

⁷⁵ Howard v. Refuge Friendly Society, 54 Law T. (N. S.) 644; Russell v. De Grand, 15 Mass. 35; 1 Story, Eq. Jur. (6th Ed.) 69; Welsh v. Cutler, 44 N. H. 561. Nor can the insurer collect the premium in such case. Eldred v. Malloy, 2 Colo. 320, 25 Am. Rep. 752; Comly v. Hillegass, 94 Pa. St. 132, 39 Am. Rep. 774.

insurer, and the insurance was had in a solvent company, at ordinary and usual rates, for an amount reasonably commensurate with the infant's estate.⁷⁶

Excuses for Nonpayment.

It is elementary that when the performance of a contract becomes impossible by the act of God, the obligor is excused, and his rights under the contract are not forfeited. This rule contemplates only cases of absolute impossibility to perform—contracts in which the conditions could not have been performed by the obligors, nor by others for them, and where neither the exercise of prudence or foresight could have provided against the effects of the act of God. Neither sickness nor insanity of the insured is an excuse for failure to pay the premium, for the act required is not a personal act, and could have been performed by others than the insured.⁷⁷ Otherwise where the contract contains a provision to the contrary in case of sickness, or for valid reason, or provides for payment within a reasonable time after the premium becomes due.⁷⁸ The insured is not excused from paying his premiums because the insurer holds his policy as bailee;⁷⁹ nor because the insurer has engaged in business which is *ultra vires* its powers, unless the insured is specially damaged thereby.⁸⁰ A premium cannot be paid by an intermeddler.⁸¹ But the beneficiary of a certificate on the life of her

⁷⁶ Johnson v. Northwestern Mut. Life Ins. Co., 56 Minn. 365.

⁷⁷ Klein v. New York Life Ins. Co., 104 U. S. 88; Thompson v. Knickerbocker Life Ins. Co., 104 U. S. 252; Wheeler v. Connecticut Mut. Life Ins. Co., 82 N. Y. 543; Carpenter v. Centennial Mut. Life Ass'n, 68 Iowa, 453, 27 N. W. 456.

⁷⁸ Dennis v. Massachusetts Ben. Ass'n, 47 Hun (N. Y.), 338; Van Houten v. Pine, 38 N. J. Eq. 72; Howell v. Knickerbocker Life Ins. Co., 44 N. Y. 276.

⁷⁹ Howard v. Mutual Ben. Life Ins. Co., 6 Mo. App. 577.

⁸⁰ Haydel v. Mutual Reserve Fund Life Ass'n, 98 Fed. 200.

⁸¹ Whiting v. Massachusetts Mut. Life Ins. Co., 129 Mass. 240.

father who is insane and incapable of attending to business, is entitled to notice of his default in paying assessments, and has the right to pay them herself after she has given notice to the company of his condition, and requested notice of default.⁸² An insurer, however, is not bound to give notice of the day upon which the premium becomes due, unless the contract so provides, and its failure to give notice, though its usage has been to the contrary, will not excuse the non-payment.⁸³ But misrepresentations of the insurer and its agents, which mislead the insured, and induce him to refrain from paying the premiums, furnish a good excuse for non-payment.⁸⁴

EXCUSE FOR DEFAULT — TENDER.

§ 134. After the insurer has declared a policy forfeited or terminated the insured need not tender subsequent premiums.

A tender of a premium when due to one authorized to receive payment is just as effective to preserve the rights of the insured as its payment would have been.⁸⁵ After an insurer has declared a policy forfeited the insured loses no rights by failure to tender subsequent premiums. One party cannot predicate a forfeiture upon an omission by the other which his own conduct has helped to bring about. The dec-

⁸² *Buchanan v. Supreme Conclave, I. O. H.*, 178 Pa. St. 465, 34 L. R. A. 436.

⁸³ *Smith v. National Life Ins. Co.*, 103 Pa. St. 177; *Thompson v. Knickerbocker Life Ins. Co.*, 104 U. S. 252; *Survick v. Valley Mut. Life Ass'n (Va.)*, 23 S. E. 223. As to effect of war as an excuse for nonpayment of premium, see *Clemmitt v. New York Life Ins. Co.*, 76 Va. 355; *New York Life Ins. Co. v. Statham*, 93 U. S. 24; *Connecticut Mut. Life Ins. Co. v. Duerson's Ex'r*, 28 Grat. (Va.) 630; *Mutual Ben. Life Ins. Co. v. Hillyard*, 37 N. J. Law, 444.

⁸⁴ *Colby v. Life Ind. & Inv. Co.*, 57 Minn. 510.

⁸⁵ *Hallock v. Commercial Ins. Co.*, 26 N. J. Law, 268; *Manhattan Life Ins. Co. v. Le Pert*, 52 Tex. 504; *Beatty v. Mutual Reserve Fund Life Ass'n (C. C. A.)*, 75 Fed. 65.

laration that a policy of insurance is already forfeited will constitute a sufficient justification for the omission to tender subsequently accruing premiums, upon the ground that the assured is justified in believing that no tender would be accepted.⁸⁶

Renewal Premiums.

A renewal premium is considered as in effect paid, or prepayment waived, by the delivery of a renewal receipt properly signed, continuing the policy in force, even though the policy requires actual pre-payment of the premium.⁸⁷

Reinstatement of Policy Forfeited for Nonpayment of Premium.

Where by misrepresentations of the insurer the insured is misled and induced to refrain from paying premiums he otherwise would have paid at the proper time, and because of such non-payment the policy is forfeited, he is entitled to have his policy reinstated upon payment of the proper premiums, as soon as he learns of his mistake, if this be during his life. If the insured dies before discovering his mistake the beneficiary can recover on the policy, upon payment of the premiums. The insurer will never be allowed to profit by declaring a forfeiture through non-payment which it has wrongfully induced.⁸⁸

⁸⁶ *National Mut. Ins. Co. v. Home Ben. Soc.*, 181 Pa. St. 443, 37 Atl. 519; *Supreme Lodge, K. of H., v. Davis*, 26 Colo. 252, 58 Pac. 595; *Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286; *Girard Life Ins. Co. v. Mutual Life Ins. Co.*, 86 Pa. St. 236.

⁸⁷ *Tennant v. Travellers' Ins. Co.*, 31 Fed. 322; *McCabe v. Aetna Ins. Co. (N. D.)*, 81 N. W. 427; *Willey v. Fidelity & Casualty Co.*, 77 Fed. 961.

⁸⁸ *Colby v. Life Ind. & Inv. Co.*, 57 Minn. 510; *Shelden v. National Masonic Acc. Ass'n*, 122 Mich. 403, 81 N. W. 266; *Leslie v. Knickerbocker Life Ins. Co.*, 63 N. Y. 27; ante, notes 60, 86.

A policy holder may compel reinstatement upon tender of the proper premium, where his policy is sought to be forfeited for non-payment of an excessive assessment.⁸⁹ But such an action must be brought within the time specified in the policy.⁹⁰ Where a contract provides for reinstatement the insured is entitled to be reinstated upon the exact terms stipulated for.⁹¹ And the insurer cannot, after the issuing of the contract, attach new requirements as conditions precedent to reinstatement.⁹² A policy suspended for non-payment of premium, is revived by the subsequent payment and acceptance thereof during the term of the policy and before loss has occurred.⁹³

The right of reinstatement within a certain period, upon payment of accrued assessments after the forfeiture of a policy which takes place *eo instanti* by operation of law, and without notice, according to the contract, is terminated by the death of the member without such payment during the time allowed for such reinstatement.⁹⁴

⁸⁹ Bagley v. Mutual Reserve Fund Life Ass'n, 24 Misc. Rep. (N. Y.) 634, 54 N. Y. Supp. 189.

⁹⁰ Survick v. Valley Mut. Life Ass'n (Va.), 23 S. E. 223. Concerning rights of members of mutual societies to reinstatement, see Supreme Lodge Nat. Reserve Ass'n v. Turner, 19 Tex. Civ. App. 346, 47 S. W. 44; Sovereign Camp, W. of W., v. Rothschild, 15 Tex. Civ. App. 463, 40 S. W. 553.

⁹¹ Manson v. Grand Lodge, A. O. U. W., 30 Minn. 509; Davidson v. Old People's Mut. Ben. Soc., 19 Minn. 303.

⁹² Sieverts v. National Benev. Ass'n, 95 Iowa, 710, 64 N. W. 671. In this case it was held that the insurer could not, after the issuing of a policy, bind the insured by the adoption of a by-law requiring a health certificate to be furnished as a condition precedent to reinstatement, in addition to the other requirements, unless the right to do so was expressly reserved in the contract. Hobbs v. Iowa Mut. Ben. Ass'n, 82 Iowa, 107, 47 N. W. 983.

⁹³ Schreiber v. German-American Hail Ins. Co., 43 Minn. 367; American Ins. Co. v. Klink, 65 Mo. 78.

⁹⁴ Carlson v. Supreme Council, A. L. of H., 115 Cal. 466, 35 L. R. A. 643.

An insured who, as a condition precedent to reinstatement, signs a health certificate, certifying that on its date he is and has continuously been in good health, and free from disease and infirmity, certifies only to his condition during his delinquency.⁹⁵ A reinstatement of a policy which has lapsed for non-payment of premiums, obtained through a fraudulent misrepresentation of material facts made by the insured, is ineffectual, and not binding upon the insurer.⁹⁶ The doctrine of the revival of contracts suspended by war cannot be invoked to revive a contract of life insurance whose terms make prompt payments at stipulated times the essence of the contract.⁹⁷

WAIVER OF NON-PAYMENT.

§ 135. Any agreement, declaration, or course of action on the part of an insurance company, which leads the party insured honestly and justifiably to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon a forfeiture which might otherwise be claimed under the express wording of the contract.

The fundamental general rule of the law is that the contract actually existing between the parties, and the performance of the respective obligations to which they have agreed, shall be enforced. But a contract once made may be modified, and provisions favorable to either party may be relaxed or eliminated. Whether the minds of the parties have met on such modification or relaxation may be determined as well from acts and conduct as from express words. When the exact performance of a condition is not important to the obligee, and the requirement of strict performance results in

⁹⁵ *Reilly v. Chicago Guaranty Fund Life Soc.*, 75 Minn. 377, 77 N. W. 982.

⁹⁶ *Massachusetts Ben. Life Ass'n v. Robinson*, 104 Ga. 256, 42 L. R. A. 261.

⁹⁷ *New York Life Ins. Co. v. Statham*, 93 U. S. 24.

serious injury or in forfeiture to the obligor, courts lean to such construction of the contract and the words and acts of the parties, as will be most likely to accomplish the true purpose and understanding of the parties, as well as to promote justice. In line with such general policy the rule has become established that where by failure of some exact performance a forfeiture is imposed on one party by the strict terms of an agreement, conduct of the other sufficient to induce a belief that such strict performance is not insisted upon, but that a modified performance is satisfactory and will be accepted as an equivalent, justifies a conclusion that the parties have assented to a modification of the original terms, and that their minds have met upon the new understanding that a different mode of performance shall have the same effect, or, as it is often expressed, that the obligee has waived strict performance.⁹⁸

Waiver or forfeiture for non-payment of the premium at the stipulated time will be treated as unconditional, unless a contrary understanding of the parties clearly appears.⁹⁹ An agreement made after the issuance of the policy, whereby the insurer agrees to accept quarterly instead of annual payments of premiums, and that the forfeitures stipulated for in case of non-payment shall not take effect if the premiums are paid within a reasonable time, is valid and binding.¹⁰⁰ An insurer cannot continue its right to insist upon forfeiting a contract unless payments are made, and at the same time

⁹⁸ *Hartford Life & Annuity Ins. Co. v. Unsell*, 144 U. S. 439; *Muelier v. Grand Grove*, U. A. O. D., 69 Minn. 236, 72 N. W. 48; *Roby v. American Cent. Ins. Co.*, 120 N. Y. 510; *Griffin v. Prudential Ins. Co.*, 43 App. Div. (N. Y.) 499; *Mobile Life Ins. Co. v. Pruett*, 74 Ala. 487; *Alexander v. Continental Ins. Co.*, 67 Wis. 422, 30 N. W. 727; *National Mut. Ben. Ass'n v. Jones*, 84 Ky. 110; ante, note 88.

⁹⁹ *Murray v. Home Ben. Life Ass'n*, 90 Cal. 402.

¹⁰⁰ *De Frece v. National Life Ins. Co.*, 136 N. Y. 144.

accept overdue payments of premiums whenever tendered.¹⁰¹ But an occasional acceptance of an overdue premium while the insured was in good health, does not of itself constitute a waiver of the right to enforce the stipulations of the contract concerning payment.¹⁰² And a benefit society does not waive a forfeiture for non-payment of assessments by making further assessments, and giving notice thereof within the period during which the insured has a right to reinstatement upon making payment of all accrued assessments.¹⁰³ Nor does a collection of an assessment from one whose membership has been forfeited, restore such person to membership, where the contract provides that the collection of assessments shall not operate to relieve any one from a forfeiture.¹⁰⁴ An acceptance of premiums after they are due and reinstatement of the insured does not waive the prompt payment of future premiums where there is an express agreement that the reinstatement shall not waive forfeiture for future non-payments.¹⁰⁵

A waiver that will preclude the insurer from relying on the terms of the policy must be in the nature of an estoppel. The insurer must, by some act of an agent having real or apparent authority, have done or said something that induced the plaintiff to do or forbear to do something to his prejudice.¹⁰⁶ An insurer is not required to do any affirmative act declaring forfeiture for violation of the conditions

¹⁰¹ Sweetser v. Odd Fellows' Mut. Aid Ass'n, 117 Ind. 97.

¹⁰² Lantz v. Vermont Life Ins. Co., 139 Pa. St. 546, 10 L. R. A. 577; Haydel v. Mutual Reserve Fund Life Ass'n, 98 Fed. 200.

¹⁰³ Carlson v. Supreme Council, A. L. of H., 115 Cal. 466, 35 L. R. A. 643.

¹⁰⁴ Ellerbe v. Faust, 119 Mo. 653, 25 L. R. A. 149.

¹⁰⁵ French v. Hartford L. & A. Ins. Co., 169 Mass. 510, 48 N. E. 268.

¹⁰⁶ Weidert v. State Ins. Co., 19 Or. 261.

of a policy, which causes the policy by its own terms to become void.¹⁰⁷

Illustrations—No Waiver.

Where a policy provides for forfeiture upon non-payment of the premium *ad diem*, the acceptance of a note waives payment of the premium, but the conditions of the policy concerning forfeiture for non-payment of the note becomes operative.¹⁰⁸ There is no waiver of prompt payment of a premium, unless the insurer does or omits some act whereby the insured has just ground to believe, and does believe, and

¹⁰⁷ *Betcher v. Capital Fire Ins. Co.*, 78 Minn. 240, 80 N. W. 971. See, also, concerning waiver, *New York Life Ins. Co. v. McGowan*, 18 Kan. 300; *Phenix Mut. Life Ins. Co. v. Hinesley*, 75 Ind. 1; *Missouri Valley Life Ins. Co. v. Dunklee*, 16 Kan. 158; *Robinson v. Pacific Fire Ins. Co.*, 18 Hun (N. Y.), 395; *Alabama G. L. Ins. Co. v. Garmany*, 74 Ga. 51.

For illustrations of waiver, see *Mallory v. Ohio Farmers' Ins. Co.*, 90 Mich. 112, 51 N. W. 188; *Phenix Ins. Co. v. Tomlinson*, 125 Ind. 84, 9 L. R. A. 317; *Southern Life Ins. Co. v. Kempton*, 56 Ga. 339; *Piedmont & A. Life Ins. Co. v. Lester*, 59 Ga. 812; *Hopkins v. Hawkeye Ins. Co.*, 57 Iowa, 203; *Smith v. St. Paul F. & M. Ins. Co.*, 3 Dak. 80; *Krumm v. Jefferson Fire Ins. Co.*, 40 Ohio St. 225.

Effect of other defences: The receiving and retaining of a premium after a forfeiture, waives any known previous cause of forfeiture, *Smith v. St. Paul F. & M. Ins. Co.*, 3 Dak. 80; as misrepresentations, *Seibel v. Northwestern Mut. Relief Ass'n*, 94 Wis. 253, 68 N. W. 1009; or alienation or change of title, *Cornell v. Tiverton & L. C. Mut. Fire Ins. Co. (R. I.)*, 35 Atl. 579; or the erection of an adjoining building contrary to the provisions of the policy, *Schmurr v. State Ins. Co.*, 30 Or. 29, 46 Pac. 363; or a breach of warranty, for which the insurer could avoid the policy, *Selby v. Mutual Life Ins. Co.*, 67 Fed. 490; *Phinney v. Mutual Life Ins. Co.*, 67 Fed. 493; or a breach of condition avoiding the policy in case of foreclosure of a mortgage without the insurer's consent. *Bloom v. State Ins. Co.*, 94 Iowa, 359, 62 N. W. 810.

¹⁰⁸ *Thompson v. Knickerbocker Life Ins. Co.*, 104 U. S. 252.

acts on the belief, that the insurer will make, continue, or restore the contract.¹⁰⁹

Sending the policy to the insured on his promise to remit the premium, does not estop the insurer from denying its validity for non-payment of a premium, as against a mortgagee, to whom the loss, if any, is payable, although the latter received the policy from the assured without notice of non-payment of the premium.¹¹⁰

¹⁰⁹ *Home Ins. Co. v. Karn* (Ky.), 39 S. W. 501; *Baldwin v. German Ins. Co.*, 105 Iowa, 379, 75 N. W. 326; *French v. Hartford L. & A. Ins. Co.*, 169 Mass. 510; *Mosser v. Knights Templars' & M. Life Ind. Co.*, 115 Mich. 672, 74 N. W. 230; *Equitable Life Assur. Soc. v. McElroy*, 49 U. S. App. 548, 83 Fed. 631; *Conway v. Phoenix Mut. Life Ins. Co.*, 140 N. Y. 79.

¹¹⁰ *Union Bldg. Ass'n v. Rockford Ins. Co.*, 83 Iowa, 647. See, also, *Clark v. Insurance Co. of North America*, 89 Me. 26, 35 Atl. 1008; *How v. Union Mut. Life Ins. Co.*, 80 N. Y. 32; *Brown v. Massachusetts M. L. Ins. Co.*, 59 N. H. 298.

Who can waive: See ante, c. 8, "Agents."

CHAPTER XI.

WARRANTIES AND REPRESENTATIONS.

§ 136-138. Nature and Definitions.

139. What are Warranties.

140. Representations and Misrepresentations.

141. Concealment.

142. Fraud.

143. Mistakes of Agents.

144. Waiver of Misrepresentation, Breach of Warranty, Fraud or Concealment.

145. Burden of Proof of Breach of Warranty or Misrepresentation.

NATURE AND DEFINITIONS.

§ 136. In the law of insurance a warranty is always a part of the contract.

§ 137. A warranty is a stipulation, assertion, or statement of, or related to, some fact connected with the subject matter of the insurance, upon the literal truth of which the validity of the contract depends, without regard to the materiality of such fact, or the motive which prompted such stipulation, assertion, or statement.

§ 138. A representation is a stipulation, assertion, or statement relative to the risk assumed, and is collateral to the contract. It is sufficient if a representation be substantially true, or substantially complied with. Only when made of and concerning a fact material to the risk can the falsity of a representation be asserted to defeat recovery.

The Difference between Warranties and Representations.

The difference between a warranty and a representation is that a warranty must be literally true, without regard to its materiality to the risk; while a representation must be true only so far as the representation is material to the risk. They both speak as of the time of the consummation of the contract.

A warranty in insurance enters into and forms a part of the contract itself. It defines, by way of particular stipulation, description, condition, or otherwise, the precise limits of the obligation which the insurer undertakes to assume. No liability can arise except within these limits. In order to charge the insurer, therefore, every one of the terms which defines its obligation must be satisfied by the facts which are proven in a case. From the very nature of the contract the party seeking indemnity or payment must bring his claim within the provisions of the instrument he is undertaking to enforce. A statement which is a warranty is a part and parcel of the contract itself, and in the nature of a condition precedent, and whether material to the risk or not must be strictly complied with, or literally fulfilled, before the insured can recover. It must be not merely a substantial conformity, but exact and literal; not only in material particulars, but in those that are immaterial as well.

A representation is, on the other hand, in its nature no part of the contract of insurance. Its relation to the contract is usually described by the word "collateral." It is not of the essence of the contract, but relates to something preliminary, which was an inducement to the making of the contract. Though false it does not avoid the contract, unless it relates to a fact actually material, or clearly intended by the parties to be made material. It may be proved although existing only in parol and preceding the written instrument. Unlike other verbal negotiations, it is not necessarily merged in, nor waived by, the subsequent writing. This principle is in some respects peculiar to insurance, and rests upon other considerations than the rule which admits proof of verbal representations to impeach written instruments upon the ground of fraud. Representations to insurers before or at the time of making a contract are a presentation of the

elements upon which to estimate the risk proposed to be assumed. They are the basis of the contract, the foundation, upon the faith of which it is entered into. If wrongly presented in any respect material to the risk, or by the parties understood and intended to be material thereto, the policy that may be issued thereon will not be binding. To enforce it would be to apply it to a risk which was never presented to the insurer, and to make it liable for a risk it never intended to assume.¹

Warranties—Materiality and Good Faith.

By an express warranty the insured stipulates for the absolute truth of his statements. Good faith and honest

¹ *Cable v. United States Life Ins. Co.* (C. C. A.), 111 Fed. 26; *Weil v. New York Life Ins. Co.*, 47 La. Ann. 1405, 17 So. 853; *Mutual Ben. Life Ins. Co. v. Robison* (C. C. A.), 58 Fed. 723; *Kimball v. Aetna Ins. Co.*, 9 Allen (Mass.), 540; *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183; *Continental Life Ins. Co. v. Rogers*, 119 Ill. 474; *O'Niel v. Buffalo Fire Ins. Co.*, 3 N. Y. 122; *Williams v. New England Mut. Fire Ins. Co.*, 31 Me. 219; *American Credit Ind. Co. v. Carrollton Furniture Mfg. Co.* (C. C. A.), 95 Fed. 111; *Continental Life Ins. Co. v. Young*, 113 Ind. 159; *Western Assur. Co. v. Redding* (C. C. A.), 68 Fed. 714.

“An express warranty, * * * in the law of insurance, is a stipulation inserted in writing, on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends. * * * A representation, as distinguished from a warranty, * * * ‘is a verbal or written statement, made by the assured to the underwriter [insurer] before the subscription of the policy, as to the existence of some fact or state of facts tending to induce the insurer more readily to assume the risk, by diminishing the estimate he would otherwise have formed of it.’ * * * A warranty is always part of the contract, a condition precedent, upon the fulfillment of which its validity depends. A representation, on the other hand, is not part of the contract, but is collateral to it. The essential difference between a warranty and a representation is that in the former it must be literally fulfilled or there is no contract, the parties having stipulated that the subject of the warranty is material, and closed all inquiry concerning it; while in the latter, if the representation prove to be untrue, still, if it is not

purpose will not excuse error. The statements must be entirely true, or the warranty is not fulfilled. Nor is it material that some of the facts stipulated, or statements or answers made and warranted to be true, may be unimportant. The parties have agreed to their materiality by making them warranties, and have set inquiry as to that question at rest. Where an insured makes the truth of the statements contained in his application the basis of his contract of insurance, the question whether or not a false statement is actually material to the risk is unimportant, as is also the question whether or not the falsehood was intentional. To avoid liability it is sufficient for the insurer to show that the statement was actually untrue. Where one asserts that certain statements are true, and that if they are not true this fact shall avoid the policy, whether they are actually material is not important, as parties have the right to make their truth the basis of the contract.²

In some states there are statutes regulating this matter, and providing that no representations or untrue statement in an application for a policy shall effect a forfeiture, unless it pertains to matters material to the risk. Such statutes

material to the risk, the contract is not avoided." *Aetna Ins. Co. v. Grube*, 6 Minn. 82 (Gil. 32); *Angell, Ins.* §§ 140-147; *Burritt v. Saratoga County Mut. Fire Ins. Co.*, 5 Hill (N. Y.), 188.

² *Aetna Life Ins. Co. v. France*, 91 U. S. 510; *Cuthbertson v. North Carolina Home Ins. Co.*, 96 N. C. 481; *Cushman v. United States Life Ins. Co.*, 63 N. Y. 404; *Cobb v. Covenant Mut. Ben. Ass'n*, 153 Mass. 176; *McGowan v. Supreme Court, I. O. of F.*, 104 Wis. 173, 80 N. W. 603; *Voss v. Eagle L. & H. Ins. Co.*, 6 Cush. (Mass.) 42. The purpose in requiring a warranty is to dispense with inquiry, and cast entirely upon the assured the obligation that the facts shall be as represented. *State Mut. Fire Ins. Co. v. Arthur*, 30 Pa. St. 315.

Materiality of warranty a question of law: *Patten v. Farmers' Mut. Fire Ins. Co.*, 38 N. H. 338; *Hutchins v. Cleveland Mut. Ins. Co.*, 11 Ohio St. 477; *Shoemaker v. Glens Falls Ins. Co.*, 60 Barb. (N. Y.) 84.

control the rights of parties to make contracts within their respective states, and cannot be overthrown by a provision in a policy that all representations shall be deemed warranties, and shall avoid the policy if untrue, irrespective of their materiality.³ Technical warranties, as well as representations, although referred to in the policy as part of the contract, are included in the provisions of a statute which provides that misrepresentations in the negotiations of a contract shall not be deemed material unless made with actual intent to deceive, or unless the matter misrepresented increases the risk.⁴

Same — Kinds.

Warranties may be express, as where they appear upon the face of the contract; or implied from the very nature of the contract itself, as, in marine insurance, concerning the seaworthiness of the ship insured, or in fire insurance, concerning the existence of the subject matter of the risk, or in life insurance, concerning the life of the party insured; or affirmative, as where the assured expressly affirms the existence of certain facts at the time of the making the application; or promissory, as where the assured undertakes to perform some executory stipulation, as that certain things shall be done, or certain conditions will continue to exist.

If a warranty be express or affirmative it must be literally and absolutely true; if promissory it must be strictly performed. There may be several warranties, and of each class, in one policy.⁵

³ *Fidelity Mut. Life Ass'n v. Ficklin*, 74 Md. 185; *Penn Mut. Life Ins. Co. v. Mechanics' Sav. Bank & Trust Co.*, 37 U. S. App. 692, 43 U. S. App. 75, 72 Fed. 413, 73 Fed. 653.

⁴ *White v. Provident Sav. Life Assur. Soc.*, 163 Mass. 108, 27 L. R. A. 398.

⁵ *Stout v. City Fire Ins. Co.*, 12 Iowa, 371, 79 Am. Dec. 539; *Jennings v. Chenango County Mut. Ins. Co.*, 2 Denio (N. Y.), 75; *Copp*

WHAT ARE WARRANTIES.

§ 139. Whether an assertion or stipulation is a warranty or representation is a question of law. Warranties will not be created nor extended by construction. They must arise from the fair interpretation and clear intendment of the language used. The application is in itself merely collateral to the contract of insurance, and its statements are to be classified as representations unless by force of a reference in the policy they are converted into warranties, and the purpose is clearly manifested from the papers thus connected that the whole shall form one entire contract.

The general rule in insurance is that a warranty must appear on the face of the policy, and no statements or declarations or representations are regarded as warranties unless clearly stipulated to be such. If a doubt exists as to whether a statement is a warranty or a representation, it will be held a representation. In construing the contract for the purpose of determining whether the statements were intended by the parties thereto to be warranties or representations, the court will take into consideration the situation of the parties, the subject matter of the contract, and the language employed, and will construe a statement made to be a warranty only when it clearly appears that such is the expressed intention of the contracting parties.

Among the settled rules for the construction of policies of insurance, are these: 1. That all the conditions and obligations of the contract will be construed liberally in favor of the assured, and strictly against the insurer. 2. That the clearest and most unequivocal language is necessary to create a warranty, and all statements of doubtful meaning will be construed as representations merely. 3. That even though the warranty and any matter or fact be declared by the policy, its effect may be modified by other portions of the policy, or of the application, including questions and answers, so that the

answers to questions not material to the risk may be construed as warranting only their honesty and good faith.⁶

But technical words or forms of expression are not essential to the creation of a warranty. Words of affirmation, or statements on the part of the insured, contained in his application, and relating to the risk, or affecting its character and extent, upon the strength of which it must be inferred the insurer contracted, will ordinarily be construed as a warranty.⁷

v. German American Ins. Co., 51 Wis. 637; *Duncan v. Sun Fire Ins. Co.*, 6 Wend. (N. Y.) 488; post, notes 36-44.

⁶ *Wilkinson v. Connecticut Mut. Life Ins. Co.*, 30 Iowa, 119; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Kentucky & L. Mut. Ins. Co. v. Southard*, 8 B. Mon. (Ky.) 634; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416; *First Nat. Bank of Kansas City v. Hartford Fire Ins. Co.*, 95 U. S. 673; *Alabama Gold Life Ins. Co. v. Johnston*, 80 Ala. 467; *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341; *Penn Mut. Life Ins. Co. v. Wiler*, 100 Ind. 92.

The words "no fire in and about the building, except one under kettle, securely imbedded (in masonry) and used for heat," are not a warranty, and only affirm the condition of the premises at the time the insurance was effected. *Schmidt v. Peoria M. & F. Ins. Co.*, 41 Ill. 295. And a statement that wooden casks in the building will be kept filled constantly, is not a warranty against the negligence of the servants of the assured to obey his orders in that respect. *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416. See, also, *Gerhauser v. North British & M. Ins. Co.*, 7 Nev. 174. A breach of warranty does not occur upon the failure of the insured to drop other insurance according to the stipulations of his application. *Commercial Mut. Acc. Co. v. Bates*, 176 Ill. 194, 52 N. E. 49. A warranty that smoking is not allowed on the premises is not broken by the assured or others afterwards smoking there, if smoking on the premises was forbidden at the time of the making of the warranty. *Hosford v. Germania Fire Ins. Co.*, 127 U. S. 399. See, also, *Hale v. Life Ind. & Inv. Co.*, 65 Minn. 548; *Aetna Ins. Co. v. Norman*, 12 Ind App. 652, 40 N. E. 1116, 24 Ins. L. J. 611; *Moulor v. American Life Ins. Co.*, 111 U. S. 335; *First Nat. Bank of Kansas City v. Hartford Fire Ins. Co.*, 95 U. S. 673; *Fitch v. American Popular Life Ins. Co.*, 59 N. Y. 557; *Hoose v. Prescott Ins. Co.*, 84 Mich. 309, 47 N. W. 587.

⁷ *Texas Banking & Ins. Co. v. Stone*, 49 Tex. 4; post, notes 36-44.

When the Application and Other Papers are Part of the Contract.

As we have before seen, a warranty must be contained in the final contract of the parties. It is considered to be on the face of the policy although it may be written in the margin, or transversely, or in a subjoined paper referred to in the policy. The contract may by proper words adopt and make a part of it any other writing or paper. But in order that they may form a part of the contract the policy must not only refer to, but must in express terms, or by necessary implication, adopt such other writing or paper as a part of itself, and a mere reference thereto, without special or necessary inclusion, does not make such writing or paper referred to a part of the policy or contract itself, nor the statements therein warranties.

Statements contained in an application are of themselves mere representations, and in order that they may have the force and effect of warranties they must not only be made a part of the contract, but it must appear upon an examination of the entire contract that they were deemed conditions upon the literal truth or fulfillment of which the validity of the insurance was intended to rest. To give the effect of a warranty to an application referred to in the policy, it should be referred to in such a manner as to show that it was intended by the parties that it should have such effect.⁸ But if the policy provides that the application shall constitute a part of the contract, statements which otherwise would be mere representations may be converted into warranties.⁹ The at-

⁸ *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex. 338, 7 L. R. A. 217; *Vivar v. Supreme Lodge, K. of P.*, 52 N. J. Law, 455; *Farmers' Insurance & Loan Co. v. Snyder*, 16 Wend. (N. Y.) 481; *Rogers v. Phenix Ins. Co.*, 121 Ind. 570; *Kratzenstein v. Western Assur. Co.*, 116 N. Y. 54, 5 L. R. A. 799; ante, § 52.

⁹ *Smith v. Empire Ins. Co.*, 25 Barb. (N. Y.) 497; *Kelsey v. Uni-*

taching of an application to the back of a policy with mucilage, is an indorsement of the application upon the policy, within the provisions of the policy that the insured is accepted in consideration of the warranties contained in the application indorsed on the policy.¹⁰

Sometimes the application is by statute required to be annexed to or contained in the policy.¹¹ The mere statement in the application that it is to become a part of the policy, is not alone always held sufficient to make it a part of the contract.¹²

versal Life Ins. Co., 35 Conn. 225; Cerys v. State Ins. Co., 71 Iowa, 338, 73 N. W. 849, 27 Ins. Law J. 258.

¹⁰ Reynolds v. Atlas Acc. Ins. Co., 69 Minn. 93, 71 N. W. 831. See, also, as to when an application is a part of the contract, Bartlett v. Fireman's Fund Ins. Co., 77 Iowa, 155, 41 N. W. 601; Cronin v. Fire Ass'n of Philadelphia, 123 Mich. 277, 82 N. W. 45; Boyle v. Northwestern Mut. Relief Ass'n, 95 Wis. 312, 70 N. W. 351; Aloe v. Mutual Reserve Life Ass'n, 147 Mo. 561, 49 S. W. 553; Brady v. United Life Ins. Ass'n (C. C. A.), 60 Fed. 727; American Ins. Co. v. Gilbert, 27 Mich. 429; Cox v. Aetna Ins. Co., 29 Ind. 586; King Brick Mfg. Co. v. Phoenix Ins. Co., 164 Mass. 291, 41 N. E. 277.

Survey: A general reference to the description of the insured property on file in the office of the insurers does not make it a part of the contract. Stebbins v. Globe Ins. Co., 2 Hall (N. Y.), 675. It must appear that it was the intention and agreement of the parties to have other papers considered a part of the contract, before they will be held to be such. Le Roy v. Park Fire Ins. Co., 39 N. Y. 56; Kentucky & L. Mut. Ins. Co. v. Southard, 8 B. Mon. (Ky.) 634; Jennings v. Chenango County Mut. Ins. Co., 2 Denio (N. Y.) 75. And a survey or diagram will only bind the applicant when it appears that it was prepared by him or under his direction, or that he assented to it prior to the consummation of the contract. Vilas v. New York Cent. Ins. Co., 72 N. Y. 590; Le Roy v. Park Fire Ins. Co., *supra*; Denny v. Conway S. & M. Fire Ins. Co., 13 Gray (Mass.), 492; Lycoming Fire Ins. Co. v. Jackson, 83 Ill. 302.

¹¹ Mullaney v. National F. & M. Ins. Co., 118 Mass. 393; Johnson v. Scottish U. & N. Ins. Co., 93 Wis. 223, 67 N. W. 416; Goodwin v. Provident Sav. Life Assur. Ass'n, 97 Iowa, 226, 66 N. W. 157, 32 L. R. A. 473.

¹² Owens v. Holland Purchase Ins. Co., 56 N. Y. 565.

Application not part of policy: A stipulation in an application that the statements made therein shall be the basis of a contract of

Construction of Application and Warranties.

A statement by an applicant that all the statements and answers made by him in his application are warranted by him to be true, is not a warranty that the answers given are full and complete, but only that the answers as given are true. The applicant is bound to answer correctly and truthfully only in so far as he undertakes to answer, and his warranty cannot be extended beyond the answers actually given. If a question is not answered there is no warranty, and if only partially answered the warranty cannot be extended beyond the answer, for it can only be predicated on the affirmation of something not true.¹³ A question to which no answer is given raises no inference for or against the person signing the application. The situation is the same as if the question had not been asked.¹⁴

The distinction between an answer apparently complete, but in fact incomplete, and therefore untrue, and an answer manifestly incomplete, and as such accepted by the insurer, may be illustrated by two cases of fire insurance, which are governed by the same rules in this respect as cases of life insurance. If one applying for insurance upon a building against fire, is asked whether the property is encumbered, and for what amount, and in his answer discloses only one mortgage when in fact there are two, the policy issued thereon insurance, and that the insured warrants the same to be true, does not necessarily make the warranties a part of the policy. *Boehm v. Commercial Alliance Life Ins. Co.*, 9 Misc. Rep. 529, 30 N. Y. Supp. 660; *Northwestern Mut. Life Ins. Co. v. Woods*, 54 Kan. 663; *Missouri, K. & T. Trust Co. v. German Nat. Bank of Denver (C. C. A.)*, 77 Fed. 117; *Conover v. Massachusetts Mut. Life Ins. Co.*, 3 Dill. 217, Fed. Cas. No. 3,121; *Presbyterian Mut. Assur. Fund v. Allen*, 106 Ind. 593.

¹³ *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256; *Hale v. Life Ind. & Inv. Co.*, 65 Minn. 557. See ante, note 6.

¹⁴ *Briesenmeister v. Supreme Lodge, K. of P.*, 81 Mich. 525, 45 N. W. 977.

is avoided, if the answer is warranted. But if to the same question he merely answers that the property is encumbered, without stating the amount of the encumbrances, the issuing of the policy without further inquiry is a waiver of the omission to state the amount.¹⁵ Statements contained in an application made by the agent of the insurer from facts within his own knowledge, are not binding upon the insured.¹⁶

In *Redman v. Hartford Fire Ins. Co.*,¹⁷ the application recited "that the applicant covenants and agrees with the company 'that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk, and the same is hereby made a condition of the insurance, and a warranty on the part of the assured.' The policy provides that the application 'shall be considered a part of this policy, and a warranty by the assured.'" Held, that this last stipulation means such a warranty as is stipulated in the application; that the clause "so far as are known to the applicant" is not an additional stipulation that all the facts have been stated known to be material to the risk, though not called for by the question, but it qualifies the preceding clause, changing it from an absolute covenant that the answers are true, to one that they are true so far as known.

¹⁵ *Nichols v. Fayette Mut. Fire Ins. Co.*, 1 Allen (Mass.), 63; *Towne v. Fitchburg Mut. Fire Ins. Co.*, 7 Allen (Mass.), 51; *Connecticut Mut. Life Ins. Co. v. Luchs*, 108 U. S. 498; *Lebanon Mut. Ins. Co. v. Kepler*, 106 Pa. St. 28; *Dolliver v. St. Joseph F. & M. Ins. Co.*, 128 Mass. 315.

¹⁶ *Thomas v. Hartford Fire Ins. Co.*, 20 Mo. App. 150.

¹⁷ 47 Wis. 89. See, further, as to incomplete or imperfect answers, *Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300, 44 N. J. Law, 210; *Merchants' & Mechanics' Ins. Co. v. Schroeder*, 18 Bradw. (Ill.) 216; *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183; *Johnston v.*

ILLUSTRATIONS OF WARRANTIES.

1. *Fire Insurance.***Title.**

A warranty as to the condition and extent of the title of the insured to the subject matter of the risk must be strictly complied with. A warranty that the house containing the insured property belongs to the applicant in fee, and free from all liens, is broken if the house stands on leased ground.¹⁸ And a stipulation in the policy whereby the insured covenants that he is the sole owner of the property insured, is a warranty;¹⁹ and so where the statement is made that the insurance is on "her two-story metal roof building," referring to the property covered, and the interest of the insured in it.²⁰ But an agreement that the policy shall be void if the insured is not the sole and unconditional owner does not void the policy, if he has described his actual interest.²¹ A covenant that title is held under warranty deed does not warrant a title in fee.²² It has been held that one does in effect not warrant himself to be the sole and unconditional owner of property, by accepting a policy conditioned to be void if he is not such owner;²³ but this would seem to be in direct violation of a well established rule of law, which will not permit an insured to assert a right under those portions of the policy which are advantageous to him, and repudiate the portions which are disadvantageous.

A warranty of sole and undisputed ownership is not broken

Northwestern Live Stock Ins. Co., 94 Wis. 117, 68 N. W. 868; Commercial Mut. Acc. Co. v. Bates, 176 Ill. 194.

¹⁸ Cuthbertson v. North Carolina Home Ins. Co., 96 N. C. 480; East Texas Fire Ins. Co. v. Brown, 82 Tex. 631.

¹⁹ Western Assur. Co. v. Altheimer, 58 Ark. 565.

²⁰ Breedlove v. Norwich Union Fire Ins. Co., 124 Cal. 164.

²¹ Hoose v. Prescott Ins. Co., 84 Mich. 309, 11 L. R. A. 340.

²² Rockford Ins. Co. v. Nelson, 65 Ill. 415; Merrill v. Agricultural Ins. Co., 73 N. Y. 452.

²³ Manchester Fire Assur. Co. v. Abrams (C. C. A.), 89 Fed. 932.

by the pendency of an action by a judgment creditor of a former owner to subject the property to the payment of his judgment.²⁴ A warranty that the land on which an insured building is situated is held in fee simple, is not broken because of the existence of an agreement between the insured and the owner of the adjoining premises, giving the latter the right to use one of the walls of the insured building as a party wall if this condition existed when the insurance was effected, and was known to the insurer.²⁵ The existence of a mortgage upon the property insured is not a breach of a warranty that the mortgagor is the unconditional and sole owner.²⁶ A warranty that the applicant is the sole and undisputed owner of the property insured, and that the title thereto was in his name, is not broken by the fact that the insured held a contract with the owners of the legal title, for a conveyance of the property, and was in possession of the property under that contract, and had fully performed all of the conditions of the contract, up to the time of making the application;²⁷ nor by the fact that the insured had leased the property insured under a conditional contract of sale, reserving title in himself until full payment should be made.²⁸ A warranty of ownership in the insured relates to the time of the issuing of the policy, and is not continuing.²⁹ A warranty of unconditional and sole ownership is not fulfilled if the insurer has only a bond for the title, and the vendor retains a lien for the pur-

²⁴ *Lang v. Hawkeye Ins. Co.*, 74 Iowa, 673, 39 N. W. 86.

²⁵ *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571; *Des Moines Ice Co. v. Niagara Fire Ins. Co.*, 99 Iowa, 193, 68 N. W. 600.

²⁶ *Morotock Ins. Co. v. Rodefer*, 92 Va. 747; *Vankirk v. Citizens' Ins. Co.*, 79 Wis. 627, 48 N. W. 798.

²⁷ *Baker v. State Ins. Co.*, 31 Or. 41; *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. St. 460.

²⁸ *Burson v. Fire Ass'n of Philadelphia*, 136 Pa. St. 267; *Walter v. Sun Fire Office*, 165 Pa. St. 381, 30 Atl. 945.

²⁹ *Collins v. London Assur. Corp.*, 165 Pa. St. 298, 30 Atl. 924.

chase money;³⁰ nor if the insured holds title dependent upon any conditions.³¹

Iron-Safe Clause.

A provision of a contract requiring the insured to keep a set of books, and an inventory of stock securely in an iron safe, is valid, and non-compliance with it will defeat the policy, unless, with knowledge of the forfeiture, the company waives it. An agreement and warranty of the insured to this effect, if pasted upon the policy, is a part of the contract, and must be fulfilled.³² Such provisions are reasonably construed, and only require the insured to keep in his books an intelligent record of his business transactions.³³ The policy is not voided by an accidental omission to place the daily cash sales book in the safe, where the book is not material in ascertaining a satisfactory record of the business;³⁴ nor by an

³⁰ *Liberty Ins. Co. v. Boulden*, 96 Ala. 508.

³¹ *Dwelling House Ins. Co. v. Dowdall*, 49 Ill. App. 33. See, also, for further illustrations of breach of warranty of title, *Hamilton v. Dwelling House Ins. Co.*, 98 Mich. 535; *Collins v. St. Paul F. & M. Ins. Co.*, 44 Minn. 440; *Mt. Leonard Milling Co. v. Liverpool & L. & G. Ins. Co.*, 25 Mo. App. 259; *Holloway v. Dwelling House Ins. Co.*, 448 Mo. App. 1; *Bennett v. Agricultural Ins. Co.*, 50 Conn. 420; *Mott v. Citizens' Ins. Co.*, 69 Hun (N. Y.), 501; *Syndicate Ins. Co. v. Bohn* (C. C. A.), 65 Fed. 165; *McWilliams v. Cascade F. & M. Ins. Co.*, 7 Wash. 48, 34 Pac. 140; *Breedlove v. Norwich Union Fire Ins. Co.*, 124 Cal. 164; *Kibbe v. Hamilton Mut. Ins. Co.*, 11 Gray (Mass.), 163; *McCulloch v. Norwood*, 58 N. Y. 562.

³² *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.*, 8 Tex. Civ. App. 227, 28 S. W. 1027; *City Drug Store v. Scottish U. & N. Ins. Co.* (Tex. Civ. App.), 44 S. W. 21. Compare *Mechanics' & Traders' Ins. Co. v. Floyd* (Ky.), 49 S. W. 543.

³³ *Spratt v. New Orleans Ins. Ass'n*, 53 Ark. 215, 13 S. W. 799; *Pelican Ins. Co. v. Wilkerson*, 53 Ark. 353, 13 S. W. 1103; *American Cent. Ins. Co. v. Ware*, 65 Ark. 336, 46 S. W. 129, 27 Ins. Law J. 785; *Roberts, Willis & Taylor Co. v. Sun Mut. Ins. Co.*, 19 Tex. Civ. App. 338, 48 S. W. 559.

³⁴ *Western Assur. Co. v. Redding* (C. C. A.), 68 Fed. 708.

insured removing the books from the safe when the building is threatened by fire, though in so doing he lost a portion of them.³⁵

Keeping Watchman.

A warranty that a watchman will be employed in and about the premises day and night, is broken if there be but one watchman, who sleeps at night three hundred feet away from the insured premises;³⁶ or if he only visits the premises two or three times a night.³⁷ An agreement to maintain a good watch, means a suitable and proper watch under all the circumstances.³⁸ A warranty that a watchman shall be employed about the premises day and night while the property remains idle is complied with, as to the day time, when the fireman of another mill, 450 feet distant, belonging to the insured, and the man under him, keep watch over it.³⁹ A temporary absence of a watchman on matters connected with his employment, is not a breach of the warranty, unless the loss occurs during his absence;⁴⁰ and his temporary absence does not relieve the company from liability if the fire was not due to his absence.⁴¹

³⁵ *Liverpool & L. & G. Ins. Co. v. Kearney (Indian T.)*, 46 S. W. 414, 27 Ins. Law J. 873. See, also, on construction of "iron safe" clause, *Scottish U. & N. Ins. Co. v. Stubbs*, 98 Ga. 754; *Goldman v. North British Mercantile Ins. Co.*, 48 La. Ann. 223; *Virginia F. & M. Ins. Co. v. Morgan*, 90 Va. 290, 18 S. E. 191.

³⁶ *Rankin v. Amazon Ins. Co.*, 89 Cal. 203.

³⁷ *McKenzie v. Scottish U. & N. Ins. Co.*, 112 Cal. 548; *First Nat. Bank v. North America Ins. Co.*, 50 N. Y. 45.

³⁸ *Parker v. Bridgeport Ins. Co.*, 10 Gray (Mass.), 302.

³⁹ *Spies v. Greenwich Ins. Co.*, 97 Mich. 310, 56 N. W. 560; *McGannon v. Michigan Millers' Mut. Fire Ins. Co.*, 87 N. W. 61.

⁴⁰ *Au Sable Lumber Co. v. Detroit Manufacturers' Fire Ins. Co.*, 89 Mich. 407, 50 N. W. 870.

⁴¹ *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 27 L. R. A. 86. See, also, *Hanover Fire Ins. Co. v. Gustin*, 40 Neb. 828, 59 N. W. 375; *Phoenix Assur. Co. v. Coffman*, 10 Tex. Civ. App. 631, 32 S. W. 810;

Clear Space.

A warranty by the assured that a continuous clear space for a certain distance shall be maintained between the property insured, and any other property, creates a warranty *in futuro*, and it is of no consequence that the defendant's agent knew that it was not fulfilled, when he took the application.⁴² Such a covenant is of the very essence of the contract, and its breach, unless waived, relieves the insurer.⁴³ A warranty to keep in the building insured, and within ten feet of a gin-stand, a barrel full of water, and two buckets, requires the insured to see that the water and buckets are at all times reasonably accessible.⁴⁴

Use and Occupation.

Statements concerning the condition or description, or use of property insured, are frequently held to be representations merely, and will be held warranties only when such an

Blumer v. Phoenix Ins. Co., 48 Wis. 535; Sheldon v. Hartford Fire Ins. Co., 22 Conn. 235, 58 Am. Dec. 420; American Fire Ins. Co. v. Brighton Cotton Mfg. Co., 125 Ill. 131, 17 N. E. 771; Sierra M., S. & M. Co. v. Hartford Fire Ins. Co., 76 Cal. 235; Virginia F. & M. Ins. Co. v. Buck, 88 Va. 517.

⁴² Michigan Shingle Co. v. London & L. Fire Ins. Co., 91 Mich. 441, 51 N. W. 1111. But in Michigan Shingle Co. v. State Inv. & Ins. Co., 94 Mich. 389, 53 N. W. 945, it was held that the insurer was estopped from avoiding the policy for deficiency of clear space, where its agent, when he wrote the policy, knew the condition of the insured property, and a clear space for the stipulated distance did not exist, and that the insured could not control a clear space for that distance, and the agent decided that the existing clear space was satisfactory, and fixed the rate of premium accordingly, and, after knowledge that the clear space was not maintained, took no steps to cancel the policy,—two judges dissenting.

⁴³ Jones v. Insurance Co. of North America, 90 Tenn. 604.

⁴⁴ Mechanics' Ins. Co. v. Thompson, 57 Ark. 279, 21 S. W. 468; Southern Ins. Co. v. White, 58 Ark. 277, 24 S. W. 425. Compare Masters v. Madison County Mut. Ins. Co., 11 Barb. (N. Y.) 624. Burleigh v. Gebhard Fire Ins. Co., 90 N. Y. 220.

effect is clearly stipulated for. But if the descriptive statement be a substantive part of the contract, or if it appears that in reliance upon the statement as to the future use of the property the insurance was effected at special rates, the statements will sometimes be held warranties, though not expressly made so.⁴⁵ Thus a statement that a building is occupied as a "dwelling and boarding house" has been held to be a warranty as to the use to which it was then put.⁴⁶ A warranty that premises are used as a boarding house is not broken if a part of them be subsequently used as a bar-room and billiard room, if such change is not forbidden, and if the risk be not increased.⁴⁷ A statement in a policy describing the property insured as a building "while occupied by assured as a store and dwelling house," and providing that the policy shall be void if the property shall become vacant or unoccupied, is not a warranty as to the future use or occupancy of the building.⁴⁸

⁴⁵ *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533, 35 Am. Dec. 92; *Continental Ins. Co. v. Kasey*, 25 Gratt. (Va.) 268, 18 Am. Rep. 681; *Michigan Shingle Co. v. London & L. Fire Ins. Co.*, 91 Mich. 441, 51 N. W. 1111; *Fowler v. Aetna Fire Ins. Co.*, 6 Cow. (N. Y.) 673; *United States F. & M. Ins. Co. v. Kimberly*, 34 Md. 224; *Sarsfield v. Metropolitan Ins. Co.*, 61 Barb. (N. Y.) 479, 42 How. Prac. 97.

⁴⁶ *Franklin Fire Ins. Co. v. Martin*, 40 N. J. Law, 568; *Hall v. People's Mut. Fire Co.*, 6 Gray (Mass.), 185.

⁴⁷ *Martin v. State Ins. Co.*, 44 N. J. Law, 485. See, also, *United States F. & M. Ins. Co. v. Kimberly*, 34 Md. 224, 6 Am. Rep. 325; *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533, 35 Am. Dec. 92; *Joyce v. Maine Ins. Co.*, 45 Me. 168; *Sillem v. Thornton*, 3 El. & Bl. 868; *Billings v. Tolland County Mut. Fire Ins. Co.*, 20 Conn. 139; *Hall v. People's Mut. Fire Ins. Co.*, 6 Gray (Mass.), 187; *Wall v. East River Mut. Ins. Co.*, 7 N. Y. 370.

⁴⁸ *Burlington Ins. Co. v. Brockway*, 138 Ill. 644, 28 N. E. 799.

"Incumbrances, breach of warranty:" *State Ins. Co. v. Jordan*, 24 Neb. 358, 38 N. W. 839; *Smith v. Agricultural Ins. Co.*, 118 N. Y. 522; *Lang v. Hawkeye Ins. Co.*, 74 Iowa, 673, 39 N. W. 86; *Leonard v. American Ins. Co.*, 97 Ind. 299; *Bowman v. Franklin Ins. Co.*, 40 Md. 620; *Bidwell v. Northwestern Ins. Co.*, 19 N. Y. 179.

*2. Life Insurance.***Generally.**

Policies of life insurance are usually issued upon written applications, which contain numerous questions to be answered by the applicants. If the policy provides that the application is a part of the contract and that the answers given are warranties the breach of any one of them vitiates the contract; as, a mis-statement of age;⁴⁹ or name;⁵⁰ or occupation.⁵¹ A provision in a life insurance policy that the insured shall not be connected with the liquor business relates to the occupation of the insured subsequent to the consummation of the contract, and an answer in an application (warranted to be true) that the applicant was a grocer, without stating anything more in relation to his occupation, while it appeared that he then sold liquor at retail in a partition por-

Other warranties; *Bilbrough v. Metropolis Ins. Co.*, 5 Duer (N. Y.), 587 (as to time factory ran); *Glens Falls Portland Cement Co. v. Travellers' Ins. Co.*, 11 App. Div. 411, 42 N. Y. Supp. 285 (warranty that insured would maintain statutory safeguards on premises); *Northrup v. Piza*, 43 App. Div. 284, 60 N. Y. Supp. 363 (warranty of completion of party wall); *Murdock v. Chenango County Mut. Ins. Co.*, 2 N. Y. 210 (warranty that chimney would be built); *Grubbs v. Virginia F. & M. Ins. Co.*, 110 N. C. 108 (a statement in an application for insurance that "the clerk sleeps in the store" is not a continuing warranty that the clerk will continue to sleep there); *City of Worcester v. Worcester Mut. Fire Ins. Co.*, 9 Gray (Mass.), 27 (warranty concerning removal of ashes); *Rosebud M. & M. Co. v. Western Assur. Co.* (U. S. Cir. Ct.), 25 Ins. Law J. 693 (breach of warranty concerning communication of fire, and situation of machinery); *Waterbury v. Dakota F. & M. Ins. Co.*, 6 Dak. 468, 43 N. W. 697 (warranty concerning building of brick chimney).

⁴⁹ *Hartford Fire Ins. Co. v. Moore*, 13 Tex. Civ. App. 644, 36 S. W. 146; *Butler v. Supreme Council, C. B. L.*, 43 App. Div. 531, 60 N. Y. Supp. 70; *McCarthy v. Catholic K. & L. of A.*, 102 Tenn. 345, 52 S. W. 142; *United Brethren Mut. Aid Soc. v. White*, 100 Pa. St. 12; *Swett v. Citizens' Mut. Relief Soc.*, 78 Me. 543, 7 Atl. 394.

⁵⁰ *Quandt v. Grand Lodge, I. G. O.*, 13 Nat. Corp. Rep. 614.

⁵¹ *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281.

tion of his store, will not, in the absence of proof of intent to deceive, avoid the policy.⁵² The insurer is entitled to an honest and full answer to the questions asked concerning the occupation of the applicant. The information called for is the occupation at the time the application is made, and the usual rather than the temporary occupation. If the answer given and warranted is not true, the policy is avoided.⁵³

Suicide.

A warranty that the insured will not die by his own act, "whether sane or insane," is an affirmative and a continuing warranty and is not invalid as imposing an impossible condition by attempting to control the act of the insured while insane.⁵⁴

Temperate.

The word "temperate" as used in an application for insurance, means moderation in the use of intoxicating liquors, and does not imply total abstinence from their use. A warranty that the insured is temperate means that he refrains from excessive indulgence in the use of intoxicants, and not that he never uses them. A warranty that the applicant has never been intemperate is not broken by occasional excessive in-

⁵² *McGurk v. Metropolitan Life Ins. Co.*, 56 Conn. 528, 1 L. R. A. 563.

⁵³ *United Brethren Mut. Aid Soc. v. White*, 100 Pa. St. 12; *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341; *Northwestern Mut. Life Ins. Co. v. Amerman*, 119 Ill. 329, 10 N. E. 225; *Hart v. National Masonic Acc. Ass'n*, 105 Iowa, 717, 75 N. W. 508; *Triple Link Mut. Ind. Ass'n v. Williams*, 121 Ala. 138, 26 So. 19; *Stone's Adm'rs v. United States Casualty Co.*, 34 N. J. Law, 371; *Ford v. United States Mut. Acc. Relief Co.*, 148 Mass. 153, 19 N. E. 169; *Kenyon v. Knights Templar & M. Mut. Aid Ass'n*, 122 N. Y. 247, 25 N. E. 299.

⁵⁴ *Kelley v. Mutual Life Ins. Co.*, 75 Fed. 638.

Walking on roadbed: Traders' & Travellers' Acc. Co. v. Wagley (C. C. A.), 74 Fed. 457.

dulgences, but a continuous and daily use of intoxicating drinks is not necessary to constitute intemperate habits.⁵⁵

Other Insurance.

A question of great importance frequently arises in considering the legal effect of a question as to whether the applicant has ever had his life insured in any insurance company, or if an application by him for insurance in a company has ever been rejected, or if he has applied for other insurance. The query is whether the term "insurance company" includes mutual and fraternal organizations, and whether certificates issued by them constitute insurance within the ordinary and legal acceptance of that term. The weight of authority on questions of construction of certificates as to beneficiaries, forfeitures and the like, treats fraternal and mutual benefit societies as life insurance companies, in the absence of statutes defining them not to be insurance companies, although the fact that the by-laws and constitution of the order usually become a part of the contract, may make the relation of the member to the order somewhat different from that of the ordinary relation of insurer to insured. In *Penn Mut. Life Ins. Co. v. Mechanics' Savings Bank & Trust Co.*,⁵⁶ the rule is laid down that certificates in mutual aid societies do not constitute insurance within the meaning of a question in an application blank of an insurance company as to existing

⁵⁵ *Union Mut. Life Ins. Co. v. Reif*, 36 Ohio St. 596, 38 Am. Rep. 613; *Meacham v. New York State Mut. Ben. Ass'n*, 120 N. Y. 237; *Chambers v. Northwestern Mut. Life Ins. Co.*, 64 Minn. 495, 58 Am. St. Rep. 549; *Knecht v. Mutual Life Ins. Co.*, 90 Pa. St. 118; *Mengel v. Northwestern Mut. Life Ins. Co.*, 176 Pa. St. 280, 35 Atl. 197.

⁵⁶ 37 U. S. App. 692, 43 U. S. App. 75, 72 Fed. 413, 38 L. R. A. 33; *Northwestern Masonic Aid Ass'n v. Jones*, 154 Pa. St. 99; *Theobald v. Supreme Lodge, K. of P.*, 59 Mo. App. 87; *Sparks v. Knight Templars' & M. Life Ind. Co.*, 61 Mo. App. 115; *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304.

insurance in it or another company. Judge Taft said: "Having in view the well-established rule that insurance contracts are to be construed against those who frame them, * * * and that any doubt or ambiguity in them is to be resolved in favor of the insured, we conclude that a certificate in a mutual benefit and social society, was not within the description 'policy of life insurance in any other company.' We are fortified in the conclusion by the fact that this contract is a Pennsylvania contract, and the courts of that state have uniformly held that mutual aid associations and insurance companies are so clearly to be distinguished that statutes applying to insurance companies and their policies do not have application to mutual aid associations and the certificates of life insurance which they issue to their members." But in other states it has been held that such associations are within the description of insurance companies, and that the contracts they make are properly termed policies, as that term is ordinarily used.⁵⁷

Attending Physician.

An applicant was attended by a physician within the meaning of the question in an application for life insurance, if he went to the office of a physician, told the physician that he

⁵⁷ State v. Nichols, 78 Iowa, 747; Co-operative Fire Ins. Order v. Lewis, 12 Lea (Tenn.), 136; Presbyterian Mut. Assur. Fund v. Allen, 106 Ind. 594; Com. v. Wetherbee, 105 Mass. 159; Sherman v. Com., 82 Ky. 102. See, also, Bruce v. Connecticut Mut. Life Ins. Co., 74 Minn. 314; Aloe v. Mutual Reserve Life Ass'n, 147 Mo. 561, 49 S. W. 553; Kelley v. Life Insurance Clearing Co., 113 Ala. 453, 21 So. 361; Silverman v. Empire Life Ins. Co., 24 Misc. Rep. 399, 53 N. Y. Supp. 407; Commercial Mut. Acc. Co. v. Bates, 74 Ill. App. 335; Finch v. Modern Woodmen of America, 113 Mich. 646, 71 N. W. 1104; United States Life Ins. Co. v. Smith (C. C. A.), 92 Fed. 503; Fidelity Mut. Life Ass'n v. Miller (C. C. A.), 92 Fed. 63; Tarpey v. Security Trust Co., 80 Ill. App. 378.

had a cough and spit blood, submitted to a physical examination, obtained a prescription and paid a fee therefor, and afterwards consulted the physician, and again paid a fee.⁵⁸ A statement by an applicant that he had never called a doctor in his life, made in answer to a question requiring him to state what physician last attended him, and for what complaint, is untrue if the applicant has previously called a physician, though only for a temporary ailment.⁵⁹ But a question as to the name of the physician who last attended the applicant, and the date of his last visit, has been held to refer to a physician who was in attendance upon the applicant for some disease or ailment of importance, and not for a trivial indisposition.⁶⁰

Sickness, Bodily Injury and Sound Health, etc.

The words "hurt" and "wound" in a question contained in an application for life insurance, mean and refer to any injury of the body causing an impairment of health or strength, or rendering the applicant more liable to contract disease, or less liable to resist its effects.⁶¹ "Sound health" means a state of health free from disease that affects the general soundness of the system seriously, and not a mere temporary indisposition. The phrase "serious illness" is used to define trouble

⁵⁸ *White v. Provident Sav. Life Assur. Soc.*, 163 Mass. 108, 27 L. R. A. 398; *Wall v. Royal Soc. of Goodfellows*, 179 Pa. St. 355, 36 Atl. 748.

⁵⁹ *Providence Life Assur. Soc. v. Reutlinger*, 58 Ark. 528; *Brady v. United Life Ins. Ass'n (C. C. A.)*, 60 Fed. 727. See, also, *Cobb v. Covenant Mut. Ben. Ass'n*, 153 Mass. 176, 10 L. R. A. 666; *Roche v. Supreme Lodge, K. of H.*, 47 N. Y. Supp. 774; *Mutual Life Ins. Co. v. Arhelger (Ariz.)*, 36 Pac. 895; *Aloe v. Mutual Reserve Life Ass'n*, 147 Mo. 561, 49 S. W. 553.

⁶⁰ *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306. Compare *Cushman v. United States Life Ins. Co.*, 70 N. Y. 72; *Higgins v. Phoenix Mut. Life Ins. Co.*, 74 N. Y. 6; *Dentz v. O'Neill*, 25 Hun (N. Y.), 442; *Russell v. Canada Life Assur. Co.*, 8 Ont. App. 716.

⁶¹ *Bancroft v. Home Ben. Ass'n*, 120 N. Y. 14, 8 L. R. A. 68.

of great importance, and one likely to have an influence upon the duration of life, or to impair subsequent health.⁶² A warranty by the insured that he is in sound health is broken if he is not in sound health at the time of making the warranty, whether he is aware of that fact or not.⁶³ And a warranty against local injury or infirmity is broken if the insured has a stricture.⁶⁴ A warranty against bodily or mental infirmity is not broken by the fact that the applicant was near-sighted, and had a defective vision.⁶⁵

REPRESENTATION AND MISREPRESENTATION.

§ 140. A false representation does not vitiate a policy of insurance, unless it relates to a fact actually material to the risk, or clearly intended to be made material by the agreement of the parties.

A representation need not, like a warranty, be strictly and literally complied with, but only substantially and in those particulars which are material to be disclosed to the in-

⁶² *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306, 32 N. W. 610; *Billings v. Metropolitan Life Ins. Co.*, 70 Vt. 477, 41 Atl. 516; *Meyers v. Woodmen of the World*, 193 Pa. St. 470, 44 Atl. 563.

⁶³ *Foot v. Aetna Life Ins. Co.*, 61 N. Y. 571; *Breeze v. Metropolitan Life Ins. Co.*, 24 App. Div. 377, 48 N. Y. Supp. 753; *Supreme Lodge, K. of H., v. Dickison*, 102 Tenn. 255, 52 S. W. 862; *Powers v. Northeastern Mut. Life Ass'n*, 50 Vt. 630.

⁶⁴ *Hanna v. Mutual Life Ass'n*, 11 App. Div. 245, 42 N. Y. Supp. 228.

⁶⁵ *Cotten v. Fidelity & Casualty Co.*, 41 Fed. 506. See, also, temporary ailment, *Pudritzky v. Supreme Lodge, K. of H.*, 76 Mich. 428, 43 N. W. 373; headaches, *Mutual Life Ins. Co. v. Simpson*, 88 Tex. 333, 28 L. R. A. 765; bodily or mental infirmity, fainting spells, *Manufacturers' Acc. Ind. Co. v. Dorgan (C. C. A.)*, 58 Fed. 945; family history, *Jerrett v. John Hancock Mut. Life Ins. Co.*, 18 R. I. 754, 30 Atl. 793; *Bloomington Mut. Life Ben. Ass'n v. Cummins*, 53 Ill. App. 530; disease, *World Mut. Life Ins. Co. v. Schultz*, 73 Ill. 586; temporary ailment not disease, *Northwestern Mut. Life Ins. Co. v. Heimann*, 93 Ind. 24; *Metropolitan Life Ins. Co. v. McTague*, 49 N. J. Law, 587, 9 Atl. 766; *Morrison v. Wisconsin Odd Fellows'*

surers. Where the question of the materiality of such particulars depends upon circumstances, and not upon the construction of any writing, it is a question of fact to be determined by a jury; but where the representations are in writing, their interpretation, like that of other written instruments, belongs to the court. The parties may, by the frame and contents of the contract, either by putting representations as to the quality or history of the subject insured into the form of answers to specific questions, or by the mode of referring to them in the policy, settle for themselves that they shall be deemed material; and when they have done so the insured will not afterwards be permitted to show that a fact which the parties have declared material to be truly stated to the insurers, was in fact immaterial, and thereby escape from the consequences of making a false answer to such a question. The untruth of a representation made by an applicant, and upon which a policy is issued, will not avoid the policy nor give an insurer the right to avoid it, unless the representation be material to the risk, or made so by the parties, or knowingly and fraudulently made.⁶⁶

Mut. Life-Ins. Co., 59 Wis. 162; physician, *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256; *Flynn v. Equitable Life Ins. Co.*, 78 N. Y. 568; affection of the liver, *Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250.

⁶⁶ *Weil v. New York Life Ins. Co.*, 47 La. Ann. 1405; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; *Cronin v. Fire Ass'n of Philadelphia*, 112 Mich. 106, 70 N. W. 449. See ante, note 1. Though the particular state of the assured's title in the property insured need not be stated unless inquired about by the insurers, yet a substantially untrue answer to a question put to him by an insurer, in relation to his title, will avoid the policy. *Locke v. North American Ins. Co.*, 13 Mass. 61; *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 45; *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. (Mass.) 421. This principle is equally applicable to cases of life insurance. *Vose v. Eagle L. & H. Ins. Co.*, 6 Cush. (Mass.) 49. An answer given by an applicant, which is untrue in fact, and known by the applicant to be so, avoids the policy, irre-

False representations of a material fact will avoid a policy taken on the faith thereof, whether the misrepresentation was innocently or fraudulently made.⁶⁷ But a false answer and representation in an application for re-instatement, does not affect the liability of the insurer if the policy had not lapsed, and the application was not necessary.⁶⁸

Materiality of Representation.

A misrepresentation as to an immaterial fact, does not, in the absence of moral fraud, avoid the policy, unless the contract contains a clear stipulation that any misrepresentation, no matter how immaterial, shall render it void.⁶⁹ But the parties often stipulate that all questions asked, and answers given, shall be material, and foreclose inquiry on that score,

spective of the materiality of the answer given. *Connecticut Mut. Life Ins. Co. v. Pyle*, 44 Ohio St. 19; *Sweat v. Piscataquis Mut. Ins. Co.*, 79 Me. 109. If the matter misrepresented increases the risk, it will defeat the policy although not made with intent to deceive. *Ring v. Phoenix Assur. Co.*, 145 Mass. 426. Fraudulent representations made by the assured to the insurer in an application for a policy, though not in fact material to the risk, yet material in the judgment of the insurer, and which induced him to take the risk, will avoid the policy. *Valton v. National Fund Life Assur. Co.*, 20 N. Y. 32. See, also, *Aetna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125; *Miotke v. Milwaukee Mechanics' Ins. Co.*, 113 Mich. 166.

⁶⁷ *Continental Ins. Co. v. Kasey*, 25 Grat. (Va.) 268; *Ryan v. Springfield F. & M. Ins. Co.*, 46 Wis. 671; *Cronin v. Fire Ass'n of Philadelphia*, 112 Mich. 106, 70 N. W. 448. A material misrepresentation will avoid the policy if the insurer would not have assumed the risk if it had known the truth. *Missouri, K. & T. Trust Co. v. German Nat. Bank of Denver (C. C. A.)*, 77 Fed. 117; *Johnston v. Northwestern Live Stock Ins. Co.*, 107 Wis. 344, 83 N. W. 644; *Alston v. Mechanics' Mut. Ins. Co.*, 4 Hill (N. Y.), 329; *Taylor v. Aetna Ins. Co.*, 120 Mass. 254; *Cerys v. State Ins. Co.*, 71 Minn. 338.

⁶⁸ *Massachusetts Ben. Life Ass'n v. Robinson*, 104 Ga. 256, 42 L. R. A. 261.

⁶⁹ *Manufacturers' & Merchants' Mut. Ins. Co. v. Zeitinger*, 168 Ill. 286, 48 N. E. 179; *Mosley v. Vermont Mut. Fire Ins. Co.*, 55 Vt. 142.

by providing that the untruth of any answer shall avoid the policy.⁷⁰ Statements concerning the condition and value of the property insured are immaterial where the policy is issued under a statute requiring the insurer to personally examine the property, and that the parties agree upon its insurable value.⁷¹ Whether a representation be actually material to the risk, or is made so by the contract of the parties, is sometimes a question of fact, sometimes a question of law, and sometimes a mixed question of fact and law.⁷² Misrepresentations as to the age of the insured, and as to the age of his parents at their death, and the disease of which they died, and concerning the existence of his brothers and sisters, and their health, are material as matters of law.⁷³ But the effect and materiality of a misrepresentation as to the health and physical condition of the applicant,⁷⁴ and as to the value of the goods insured,⁷⁵ and as to their location,⁷⁶ and the materiality of a misrepresentation concerning the

⁷⁰ *Stensgaard v. St. Paul Real Estate Title Ins. Co.*, 50 Minn. 429, 52 N. W. 910; *O'Brien v. Home Ins. Co.*, 79 Wis. 399, 48 N. W. 714; *Fromherz v. Yankton Fire Ins. Co.*, 7 S. D. 187, 63 N. W. 784.

⁷¹ *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 9 L. R. A. 45.

⁷² Illustrations: Overvaluation, *Boutelle v. Westchester Fire Ins. Co.*, 51 Vt. 4; misstatement as to current insurance, *Armour v. Transatlantic Fire Ins. Co.*, 90 N. Y. 450; as to title, *Graham v. Fireman's Ins. Co.*, 87 N. Y. 69; as to nature of building in which goods are kept, *Prudhomme v. Salamander Fire Ins. Co.*, 27 La. Ann. 695. See, also, *Lycoming Fire Ins. Co. v. Rubin*, 79 Ill. 402; *Schmidt v. Mutual C. & V. Fire Ins. Co.*, 55 Mich. 432; *Cerys v. State Ins. Co.*, 71 Minn. 338.

⁷³ *Lowe v. Union Cent. Life Ins. Co.*, 41 Ohio St. 273; *Hartford L. & A. Ins. Co. v. Gray*, 91 Ill. 159.

⁷⁴ *March v. Metropolitan Life Ins. Co.*, 186 Pa. St. 629, 40 Atl. 1100; *John Hancock Life Ins. Co. v. Warren*, 59 Ohio St. 45, 51 N. E. 546. See cases ante.

⁷⁵ *Lycoming Fire Ins. Co. v. Rubin*, 79 Ill. 402.

⁷⁶ *Prudhomme v. Salamander Fire Ins. Co.*, 27 La. Ann. 695.

title,⁷⁷ or value of property insured,⁷⁸ have sometimes been held to be questions for the jury. The true test of the materiality of a representation is the probable effect it had upon the conduct of the insurer in relation to the assumption of the risk.

⁷⁷ *Sweat v. Piscataquis Mut. Ins. Co.*, 79 Me. 109.

⁷⁸ *Thayer v. Providence W. Ins. Co.*, 70 Me. 531.

Other questions for jury: Physical condition, *McGowan v. Supreme Court*, 1 O. F., 104 Wis. 173, 80 N. W. 603; change in building, *Gerhauser v. North British & M. Ins. Co.*, 7 Nev. 174; description of goods, *Franklin Fire Ins. Co. v. Martin*, 40 N. J. Law, 568; value of property insured, *Farmers' Ins. Co. v. McCluckin*, 40 Ohio St. 42; *Franklin Fire Ins. Co. v. Vaughan*, 92 U. S. 516; *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381.

Illustrations of fatal misrepresentations:

Fire: Exposure and distance, *Chaffee v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 376; title, *Collins v. St. Paul F. & M. Ins. Co.*, 44 Minn. 440; *Reithmueller v. Philadelphia Fire Ass'n*, 20 Mo. App. 246; *O'Brien v. Home Ins. Co.*, 79 Wis. 399, 48 N. W. 714; protection of building with sprinklers, *Fromherz v. Yankton Fire Ins. Co.*, 7 S. D. 187, 63 N. W. 784; mortgage foreclosure, *Pinkham v. Morang & M. Mut. Fire Ins. Co.*, 40 Me. 587; danger from incendiaries, *Jennings v. Chenango County Mut. Ins. Co.*, 2 Denio (N. Y.), 75.

Life: Family history, *Jerrett v. John Hancock Mut. Life Ins. Co.*, 18 R. I. 754, 30 Atl. 793; *Bloomington Mut. Life Ben. Ass'n v. Cummins*, 53 Ill. App. 530; married or single, *United Brethren Mut. Aid Soc. v. White*, 100 Pa. St. 12; other insurance, *March v. Metropolitan Life Ins. Co.*, 186 Pa. St. 629; *Bruce v. Connecticut Mut. Life Ins. Co.*, 74 Minn. 314, 77 N. W. 210; *Penn Mut. Life Ins. Co. v. Mechanics' Sav. Bank & Trust Co.*, 37 U. S. App. 692, 43 U. S. App. 75, and note thereto in 38 L. R. A. 33; examination by physician, *March v. Metropolitan Life Ins. Co.*, supra; *Finch v. Modern Woodmen of America*, 113 Mich. 440, 71 N. W. 1104; *Ferris v. Home Life Assur. Co.*, 118 Mich. 485, 76 N. W. 1041; temperate habits, *Union Cent. Life Ins. Co. v. Lee (Ky.)*, 47 S. W. 614; *Malicki v. Chicago Guaranty Fund Life Soc.*, 119 Mich. 151, 77 N. W. 690; age, *Swett v. Citizens' Mut. Relief Soc.*, 78 Me. 541; *Lowe v. Union Cent. Life Ins. Co.*, 41 Ohio St. 273. See, also, *Valton v. National Fund Life Ins. Co.*, 20 N. Y. 32 (misrepresentation as to identity of applicant); *Siebel v. Northwestern Mut. Relief Ass'n*, 68 N. W. 1009, 94 Wis.

CONCEALMENT.

§ 141. A concealment exists when either party withholds from the other facts which are unknown to that other, and are material to the risk, and in good faith ought to be disclosed.

The rule of marine insurance, which required the insured to voluntarily disclose to the insurer all facts known to him, and material to the risk, and which the insurer had not the means

253; *Insurance Co. v. Lampkin*, 38 Pac. 335; *Supreme Council v. Green*, 71 Md. 263, 17 Atl. 1048 (identity of beneficiary material):

Illustrations of representations not fatal:

Fire: Value, or other matter stated by way of opinion, *Standard Oil Co. v. Amazon Ins. Co.*, 79 N. Y. 506; *Fisher v. Crescent Ins. Co.*, 33 Fed. 549; incumbrance, *Mutual Mill Ins. Co. v. Gordon*, 121 Ill. 366. Compare *Cerys v. State Ins. Co. of Des Moines*, 71 Minn.

338. A representation that an applicant is the owner of the premises to be insured is not false, if he is the equitable owner, though he has no legal title. *Wainer v. Milford Mut. Fire Ins. Co.*, 153 Mass. 335, 11 L. R. A. 598; *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330, 7 L. R. A. 81; *Franklin Fire Ins. Co. v. Martin*, 40 N. J. Law, 568; *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47; *Buck v. Phoenix Ins. Co.*, 76 Me. 586; *Fame Ins. Co. v. Mann*, 4 Bradw. (Ill.) 485; *Collins v. Charlestown Mut. Fire Ins. Co.*, 10 Gray (Mass.), 155. A representation that the premises were used for a residence and stores is not fatally false if in fact they were used for the purposes of a bakery and restaurant. *Richards v. Washington F. & M. Ins. Co.*, 60 Mich. 420, 27 N. W. 586. See, also, as to use, *Liverpool, L. & G. Ins. Co. v. Colgin* (Tex. Civ. App.), 34 S. W. 291. Age of building, *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472, 30 N. W. 808. A representation that stovepipes were under a brick chimney, when in fact they passed through the roof, will not avoid the policy if it be shown that the actual condition entails no additional risk, *Bankhead v. Des Moines Ins. Co.*, 70 Iowa, 387; *Eddy v. Hawkeye Ins. Co.*, supra. Taking stock, *Wynne v. Liverpool & L. & G. Ins. Co.*, 71 N. C. 121. An application for insurance on specified goods, while they are contained in a given building, into which they are to be removed, does not amount to a representation that the insured owned the building. *Omaha Fire Ins. Co. v. Crighton*, 50 Neb. 314, 69 N. W. 766. A distillery is not represented as in operation by describing it as "occupied by assured as a distillery," in a

of knowing, or was not presumed to know, has never obtained in life and fire insurance. In these latter classes of insurance the rule seems to be that an applicant need not voluntarily disclose to the insurer even matters material to the risk, except when those matters concern the very existence of the subject matter of the risk at the time the insurance is effected, and any material change in its condition between the time the application is made and the contract is consummated.⁷⁹ Any change in the health of the insured between the time of making the application and the acceptance of the risk, should be communicated to the insurer.⁸⁰ And

policy issued when it has long been idle. *Louck v. Orient Ins. Co.*, 176 Pa. St. 638. Good faith and reasonable diligence to ascertain the truth on the part of the insured in making his representations are ordinarily all that can be required of him. *Field v. Insurance Co. of North America*, 6 Biss. 121, Fed. Cas. No. 4,767; *Harrington v. Fitchburg Mut. Fire Ins. Co.*, 124 Mass. 126; *Redman v. Hartford Fire Ins. Co.*, 47 Wis. 89; *Miller v. Alliance Ins. Co.*, 19 Blatchf. 308, 7 Fed. 649; *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; *Dupree v. Virginia Home Ins. Co.*, 92 N. C. 417; *Citizens' F. & M. Ins. Co. v. Short*, 62 Ind. 316; *National Bank v. Hartford Fire Ins. Co.*, 95 U. S. 673. Compare *Goddard v. Monitor Mut. Fire Ins. Co.*, 108 Mass. 56.

Life: Physical condition, illness, etc., *Mutual Reserve Fund Life Ass'n v. Farmer*, 65 Ark. 581, 47 S. W. 850; *Sieverts v. National Benev. Ass'n*, 95 Iowa, 710, 64 N. W. 671; consulting physician, *Sieverts v. National Benev. Ass'n*, supra; *Supreme Lodge, K. of P., v. Taylor (Ala.)*, 24 So. 247; *Billings v. Metropolitan Life Ins. Co.*, 70 Vt. 477, 41 Atl. 516. A misrepresentation concerning the amount of other life insurance carried by the applicant is not always fatal, *Germania Ins. Co. v. Rudwig*, 80 Ky. 223. See, also, as to nonfatal misrepresentations, *Manhattan Life Ins. Co. v. Carder*, 42 U. S. App. 659, 82 Fed. 986; *New York Life Ins. Co. v. Baker*, 49 U. S. App. 690, 83 Fed. 647; *Wiberg v. Minnesota S. R. Ass'n*, 73 Minn. 297, age of applicant.

⁷⁹ *Washington Mills Emery Mfg. Co. v. Weymouth & B. Mut. Fire Ins. Co.*, 135 Mass. 503; *Newman v. Springfield F. & M. Ins. Co.*, 17 Minn. 123 (Gil. 98).

⁸⁰ *Ormond v. Fidelity Life Ass'n*, 96 N. C. 158; *Cable v. United States Life Ins. Co. (C. C. A.)*, 111 Fed. 26.

if, between the time of making the application and the completion of the contract the building upon which insurance is sought has been destroyed, it is the duty of the applicant to make known the facts to the insurer.⁸¹ Good faith and fair dealing require that changes so material to the risk, and of such vital importance to the insurer, if unknown to it, and known by the applicant, be communicated by the latter to the former, and the failure to make such communication is a concealment, for which the insurer can avoid the contract.⁸²

The rule that an insured is required to state fairly and fully the facts in regard to the risk, and that any fraud, or fraudulent concealment of the facts in regard to such risk will avoid the policy, only obtains when the insurer exacts such information from the insured. The latter is not bound to volunteer any information. If he answers correctly all the questions put to him, the mere omission to state matter not called for by any specific or general question, is not a concealment. If the applicant truly answers the questions put to him, and does not intentionally suppress or omit further information, though the questions suggest a fuller and more detailed reply, he has discharged his duty. If the insurer accept the partial answer it cannot claim a warranty or representation extending beyond what is disclosed. The mere failure of the assured to mention facts material to the risk, and about which the insurer does not inquire, will not vitiate the

⁸¹ *Wales v. New York Bowery Fire Ins. Co.*, 37 Minn. 106, 33 N. W. 322.

⁸² *Piedmont & A. Life Ins. Co. v. Ewing*, 92 U. S. 377; *Mutual Life Ins. Co. v. Young's Adm'r*, 23 Wall. (U. S.) 85; *Equitable Life Assur. Soc. v. McElroy*, 49 U. S. App. 548, 83 Fed. 631; *Royal Canadian Ins. Co. v. Smith*, 5 Russ. & G. (Nova Scotia) 322; *People v. Dimick*, 41 Hun (N. Y.), 616; *Blackburn v. Vigors*, 17 Q. B. Div. 533. But see *Snow v. Mercantile Mut. Ins. Co.*, 61 N. Y. 160.

policy.⁸³ And if a question in the application is not answered, and the company issues a policy on the application, it cannot afterwards complain of a concealment through failure of the applicant to answer such question.⁸⁴

An insurance company, when it issues a policy, is presumed to know what is obvious in regard to the property insured, the natural perils to which it is exposed, and the usual and customary method of conducting the business pertaining to the property insured. In the absence of express stipulation, and where no inquiry is made, a failure to state facts known to the insurer or his agent, or which he ought to know, is no concealment.⁸⁵

FRAUD.

§ 142. Either insurer or insured may be released from the legal consequences of an insurance contract into which he has been induced to enter by reliance upon the false and fraudulent statements or representations of the other contracting party.

The general law governing the matter of contracts, and the right to rescind or avoid a contract on account of fraud which induced its making, applies to insurance contracts. The

⁸³ Penn Mut. Life Ins. Co. v. Wiler, 100 Ind. 92; Hoke v. Richie, 100 Ky. 66, 37 S. W. 266, 38 S. W. 132; Flynn v. Equitable Life Ins. Co., 78 N. Y. 568; Seal v. Farmers' & Merchants' Ins. Co., 59 Neb. 253, 80 N. W. 808; Johnson v. Scottish U. & N. Ins. Co., 93 Wis. 233, 67 N. W. 416; Connecticut Mut. Life Ins. Co. v. Luchs, 108 U. S. 498.

⁸⁴ Armenia Ins. Co. v. Paul, 91 Pa. St. 520; Alkan v. New Hampshire Ins. Co., 53 Wis. 136; Rawls v. American Mut. Life Ins. Co., 27 N. Y. 282; March v. Metropolitan Life Ins. Co., 186 Pa. St. 629, 40 Atl. 1100; Dolliver v. St. Joseph F. & M. Ins. Co., 131 Mass. 39; Union Mut. Life Ins. Co. v. Wilkinson, 13 Wall. (U. S.) 230; Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 250.

⁸⁵ Hey v. Guarantors' Liability Ind. Co., 181 Pa. St. 220, 59 Am. St. Rep. 645; Faust v. American Fire Ins. Co., 91 Wis. 158, 51 Am. St. Rep. 876. The omission of an applicant to answer a question contained in the application does not constitute a concealment. American Life Ins. Co. v. Mahone, 21 Wall. (U. S.) 152.

fraud may consist either in the assertion of an untrue statement material to the risk, or in the suppression of information which good faith requires should be disclosed. An untrue statement, or denial of a material fact, preceding or contemporaneous with the consummation of a contract of insurance, prevents the policy that is based upon it from taking effect as a contract of insurance, whether the statement was made ignorantly and in good faith, or otherwise.⁸⁶ If a person is induced by false and fraudulent representations of the agent of an insurance company to take a policy in the company, and pay the premium therefor, he may rescind the contract, and recover as damages the amount of the premium paid.⁸⁷ Likewise an insurer may avoid a policy issued in reliance on false and fraudulent representations of the applicant.⁸⁸ A false statement, intentionally and knowingly or fraudulently made, constitutes fraud, and the statement of a fact as true which a party does not know to be true, and which he has no reasonable ground for believing to be true, is fraudulent.⁸⁹ And the settlement of a claim on an insurance

⁸⁶ 3 Kent, Com. 282; *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535.

⁸⁷ *Michigan Mut. Life Ins. Co. v. Reed*, 84 Mich. 524, 13 L. R. A. 351; *Godfrey v. New York Life Ins. Co.*, 70 Minn. 224; *Hedden v. Griffin*, 136 Mass. 229; *Globe Mut. Life Ins. Co. v. Reals*, 50 How. Prac. 237.

⁸⁸ *American Ins. Co. v. Gilbert*, 27 Mich. 429; *New York Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591; *Moore v. Virginia F. & M. Ins. Co.*, 28 Grat. (Va.) 508; *Digby v. American Cent. Ins. Co.*, 3 Mo. App. 603; *Harris v. Equitable Life Assur. Soc.*, 64 N. Y. 196. See, also, *Traband v. Connecticut Mut. Life Ins. Co.*, 131 Mass. 167; *Hearne v. Marine Ins. Co.*, 20 Wall. (U. S.) 488; *Piedmont & A. Life Ins. Co. v. Ewing*, 92 U. S. 377.

⁸⁹ *Linscott v. Orient Ins. Co.*, 88 Me. 497, 51 Am. St. Rep. 435. As to construction of statutes regulating effect of warranties, representations, and misrepresentations in application, see *White v. Provident Sav. Life Assur. Soc.*, 163 Mass. 108, 27 L. R. A. 398;

policy, induced by fraud, may be set aside, and the money recovered.⁹⁰

MISTAKES OF AGENTS.

§ 143. An insurance company cannot take advantage of any breach of warranty or misrepresentation resulting from the negligence or misconduct of its own agent, except where the agent and the applicant have conspired to deceive or defraud the insurer.

The rule that the breach of warranty of the truth of an applicant's answer, and that a misrepresentation of a material fact by an applicant, avoids a policy without reference to the good faith of the applicant, does not apply where the falsity of an answer, or the misstatement of fact in the application, results from a mistake in judgment, or an error or blunder of the agent of the insurer, who prepared the application, and who wrote down the answers after a full and true statement of the facts by the applicant.⁹¹ Thus an applicant for insurance who gives correct answers to all inquiries made of him, is not prejudiced by the failure of the agent of the company to correctly write the answers as given in the application signed by the applicant, even though the policy stipulates that the application shall be considered a part of

Fidelity Mut. Life Ass'n v. Ficklin, 74 Md. 172; Dolan v. Mutual Reserve Fund Life Ass'n, 173 Mass. 197, 53 N. E. 398; Kenton Ins. Co. v. Wigginton, 89 Ky. 330, 7 L. R. A. 81.

⁹⁰ Northwestern Mut. Life Ins. Co. v. Elliott, 7 Sawy. 17, 5 Fed. 225; Globe Mut. Ins. Co. v. Reals, 50 How. Prac. 237; Michigan Mut. Life Ins. Co. v. Reed, 84 Mich. 524; Potter v. Monmouth Mut. Fire Ins. Co., 63 Me. 440; State v. Towle, 80 Me. 287, 14 Atl. 195.

⁹¹ Whitney v. National Masonic Acc. Ass'n, 57 Minn. 478; Bourgeois v. Mutual Fire Ins. Co., 86 Wis. 402; Phoenix Ins. Co. v. Stocks, 149 Ill. 319; Howard Fire Ins. Co. v. Bruner, 23 Pa. St. 50; Phoenix Ins. Co. v. Warttemberg (C. C. A.), 79 Fed. 245, distinguishing New York Life Ins. Co. v. Fletcher, 117 U. S. 519; Germania Life Ins. Co. v. Lunkenheimer, 127 Ind. 536.

the policy and the applicant warrants the truth of the statements made.⁹² But an insurance company is not liable on a policy issued to one whose application contained material representations as to his health known by him to be untrue, and warranted by him to be true, even though the agent to whom the application was made had knowledge of the untruth of the statements. No man can take advantage of his own fraud, and an insurer will always be allowed to show collusion between its agent and an applicant.⁹³

WAIVER OF MISREPRESENTATION, BREACH OF WARRANTY,
FRAUD OR CONCEALMENT.

§ 144. An insurer may by its conduct estop itself from taking advantage of any breach of warranty or misrepresentation, or fraud or concealment practiced upon it by an applicant. The waiver or estoppel must be predicated upon a knowledge by the insurer of the facts claimed to have been waived by it.

An insurance company which issues a policy with full knowledge of the existence of breach of warranty or representation, thereby waives the falsity of the warranty and representation. The knowledge of the agent is the knowledge of his principal.⁹⁴ The right of an insurer to take advantage of any fact on account of which it might avoid the policy may be waived, either expressly, or by acts or con-

⁹² *German Ins. Co. v. Gray*, 43 Kan. 497, 8 L. R. A. 70; *Continental Ins. Co. v. Chamberlain*, 132 U. S. 304.

⁹³ *Nassl v. Metropolitan Life Ins. Co.*, 19 Misc. Rep. 413, 44 N. Y. Supp. 261; *Ketcham v. American Mut. Acc. Ass'n*, 117 Mich. 521, 76 N. W. 5; *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306, 32 N. W. 310. See ante, § 93, "Collusion."

⁹⁴ *Quigley v. St. Paul Title Insurance & Trust Co.*, 60 Minn. 275, 62 N. W. 287; *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737; *Mullin v. Vermont Mut. Fire Ins. Co.*, 58 Vt. 113. See ante, c. 8, "Agents;" *Finch v. Modern Woodmen of America*, 113 Mich. 646, 71 N. W. 1104; *Michigan Shingle Co. v. State Inv. & Ins. Co.*, 94 Mich. 389, 53 N. W. 945.

duct inconsistent with an intention to take advantage of the right to avoid the policy; as, by thereafter treating the policy as valid, or accepting premiums due upon it.⁹⁵

BURDEN OF PROOF OF BREACH OF WARRANTY OR REPRESENTATION.

§ 145. An insurer relying upon a breach of warranty or misrepresentation, or fraud or concealment connected with the procurement of a policy, must allege and prove the particular facts upon which it bases its defense.

The presumption of law is that a policy is a valid and binding contract. The plaintiff in a suit upon a policy is not bound to go beyond the written instrument and show the statements contained in the application, and their truth. The burden is upon the defendant, in every case, to set forth and establish the fraud, concealment, misrepresentation, breach of warranty, performance of prohibited acts, or violation of the conditions and particular facts, upon which it seeks to defeat the contract.⁹⁶

⁹⁵ New York Life Ins. Co. v. Baker, 49 U. S. App. 690, 83 Fed. 647; Com. v. Hide & Leather Ins. Co., 112 Mass. 136; Baker v. New York Life Ins. Co., 77 Fed. 550. See Waiver of Breach of Conditions of Policy; Waiver of Proofs of Loss.

⁹⁶ Chambers v. Northwestern Mut. Life Ins. Co., 64 Minn. 496, 58 Am. St. Rep. 549; Redman v. Aetna Ins. Co., 49 Wis. 431, 4 N. W. 591; Piedmont & A. Life Ins. Co. v. Ewing, 92 U. S. 377; Yore v. Booth, 110 Cal. 238, 52 Am. St. Rep. 81; Allen v. Home Ins. Co. (Cal.), 30 Ins. Law J. 712, 65 Pac. 138.

CHAPTER XII.

THE CONTRACT AND ITS INCIDENTS.

§ 146-147. The Subject Matter.

148-150. The Risk Assumed.

151. Terms, Conditions and Stipulations of the Policy.

152-157. The Liability of the Insurer.

THE SUBJECT MATTER.

§ 146. The subject matter of a contract of insurance is that interest in respect to which the payee is promised indemnity. It is the insurable interest in the subject matter of the contract which is covered by insurance, and not the life or property involved.

§ 147. Damage to any lawful and insurable interest in and to the subject matter of a risk may be insured against.

What Risks are Legal.

Any appreciable insurable interest, either in life or property, may be insured, provided encouragement and protection will not thereby be afforded to the insured in any business or project forbidden by law, or violative of public policy. A contract insuring one against illegal acts, or against loss in the conduct or maintenance of illegal business, is void. But an insurance upon property recognized in law, and protected by it, is valid, even though the property be susceptible of use, or be actually used, for an unlawful purpose. If the insured property is susceptible of lawful uses, no one can be held to contract concerning it in an illegal manner, unless the contract itself is for a directly illegal purpose. Collateral contracts, in which no illegal design enters, are not affected by an illegal transaction with which they may be remotely connected.

The principle established is that where the consideration is illegal, immoral and wrong, or where the direct purpose of the contract is to effect, advance, or encourage acts in violation of law, it is void. But if the contract sought to be enforced is collateral and independent, though in some way connected with acts done in violation of law, the contract is not void.

If the contract is legal upon its face, and was made upon good consideration, and to accomplish a good and lawful purpose, and not to further, foster, encourage or protect an unlawful purpose, it does not come within that class of cases where the consideration is a violation of law or good morals, or where the object and effect of the contract will be to promote or advance some unlawful purpose, which would thus be a violation of law, or immoral.¹

¹ Carrigan v. Lycoming Fire Ins. Co., 53 Vt. 418, 38 Am. Rep. 687; Armstrong v. Toler, 11 Wheat. (U. S.) 258; Boardman v. Merrimack Mut. Fire Ins. Co., 8 Cush. (Mass.) 583; Niagara Fire Ins. Co. v. De Graff, 12 Mich. 124; Erb v. German-American Ins. Co., 98 Iowa, 606, 40 L. R. A. 845; Phenix Ins. Co. v. Clay, 101 Ga. 331, 28 S. E. 853; Claflin v. United States Credit System Co., 165 Mass. 501, 52 Am. St. Rep. 528; Com. Ins. Co. v. Sennett, 37 Pa. St. 205, 78 Am. Dec. 418; Bradtfeldt v. Cooke, 27 Or. 194, 50 Am. St. Rep. 701.

Public policy will not permit a recovery upon a policy where the insured's death was caused by an abortion, voluntarily submitted to, without any medical necessity therefor. Wells v. New England Mut. Life Ins. Co., 191 Pa. St. 207, 43 Atl. 126. A contract of life insurance providing for payment if insured in sound mind took his own life would be against public policy, and unenforceable in law. Ritter v. Mutual Life Ins. Co., 169 U. S. 139. A contract guarantying the honesty of employees is not contrary to public policy. Fidelity & Casualty Co. v. Eickhoff, 63 Minn. 170, 65 N. W. 351. And a common carrier may lawfully insure against liability for loss of goods carried by it, though the loss be caused by the negligence of its own servants. Minneapolis, St. Paul & S. S. M. Ry. Co. v. Home Ins. Co., 64 Minn. 61, 66 N. W. 132. Insurance against business losses is valid. Hayne v. Metropolitan Trust Co., 67 Minn. 245; Claflin v. United States Credit System Co., 165 Mass. 501. A policy issued to one who has not an insurable interest in the subject-

THE RISK ASSUMED.

§ 148. The rights of the insured and the liabilities of the insurer are fixed by the contract of insurance into which they have entered.

§ 149. What risk is assumed, what interest is insured, and when and where, the extent and limitations of the liability, and what conditions or circumstances will operate to bind or release the insurer, or create or destroy a right of action in the insured, must always be determined by the terms of the contract.

§ 150. Insurance against loss or damage caused by a specified peril affords protection within the stated amount against the immediate and direct effect of that peril, unless its occurrence be caused by the wilful and wrongful act of the insured, or it happens or operates within the exceptions of the contract.

The Fire Risks.

The fair and reasonable interpretation of a policy of insurance against fire, will include, within the obligation of the insurer, every unexcepted item of loss or damage which necessarily follows from the occurrence of the fire to the amount of the actual injury to the subject of the risk, whenever that injury may arise directly and immediately from the peril, or necessarily from incidental and surrounding circumstances, the operation and control of which could not be avoided. It will cover loss and damage which the peril insured against was the means or agency in causing, even though it was due to some other efficient cause which made use of it, or set it in motion, if the original efficient cause was

matter of the risk is unenforceable. See ante, c. 9, "Insurable Interest."

As to violation of excise laws affecting insured property upon the validity of a policy, see *Kelly v. Home Ins. Co.*, 97 Mass. 288; *Lawrence v. National Fire Ins. Co.*, 127 Mass. 557; *Campbell v. Charter Oak F. & M. Ins. Co.*, 10 Allen (Mass.), 213; *Hinckley v. Germania Fire Ins. Co.*, 140 Mass. 38, 54 Am. Rep. 445; *Carrigan v. Lycoming Fire Ins. Co.*, supra; *People's Ins. Co. v. Spencer*, 53 Pa.

not in itself made a subject of separate insurance.² Thus the fire in a building is the proximate cause of damage to electrical machinery in a remote part of the building which is not burned, where the fire causes a short circuit, thereby starting a powerful current of electricity, which breaks and wrecks the machinery.³

"Direct loss or damage by fire," means loss or damage occurring directly from fire as the destroying agency, in contradistinction to the remoteness of fire as such agency.⁴ An ordinary fire policy does not cover a loss caused by escaping steam. The word "fire" does not include heat insufficient to cause ignition.⁵ A fire in a chimney, caused by the accidental ignition of soot, or the smoke issuing from such fire, is within the contract.⁶

Insurers are liable for direct and immediate, not for consequential and remote, losses from the peril insured against. When that peril is fire the instrument of destruction must be fire. Whether the cause is proximate or remote does not depend alone upon its closeness in the order of time in which certain things occur. An efficient, adequate cause being

St. 353, 91 Am. Dec. 217; *Manchester Fire Assur. Co. v. Feibelman*, 118 Ala. 308, 23 So. 759, 27 Ins. Law J. 855. As to effect of offenses against law upon policy, see *Mount v. Waite*, 7 Johns. (N. Y.) 434; *Springfield F. & M. Ins. Co. v. Cannon* (Tex. Civ. App.), 46 S. W. 375; *Cedar Rapids Ins. Co. v. Shimp*, 16 Ill. App. 248; *Indiana Ins. Co. v. Brehm*, 88 Ind. 578.

² *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *Case v. Hartford Fire Ins. Co.*, 13 Ill. 676; *Wheeler v. Traders' Ins. Co.*, 62 N. H. 450, 13 Am. St. Rep. 585; *Heffron v. Kittanning Ins. Co.*, 132 Pa. St. 580; *Renshaw v. Fireman's Ins. Co.*, 33 Mo. App. 403.

³ *Lynn Gas & Electric Co. v. Meriden Fire Ins. Co.*, 158 Mass. 570, 20 L. R. A. 297.

⁴ *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387.

⁵ *Gibbons v. German Ins. & Sav. Institution*, 30 Ill. App. 263.

⁶ *Way v. Abington Mut. Fire Ins. Co.*, 166 Mass. 67, 43 N. E. 1032, 32 L. R. A. 608.

found, it must be deemed the true cause, unless some other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result. When it is said that the cause to be sought is the direct and proximate cause, it is not meant that the cause or agency which is nearest in point of time or place to the result is necessarily to be shown. The active, efficient cause, that sets in motion a train of events which brings about a result, without the intervention of any force started and working actively from a new source, is the direct and proximate cause. The primary cause may be the proximate cause, though it may operate through successive instruments; as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement. The question always is, Was there an unbroken connection? Did the facts constitute a continuous succession of events, so linked together as to form a natural whole, or was there some new and independent cause intervening between the primary cause and the ultimate damage.⁷

Where the negligent act of the insured, or of somebody else, causes a fire, and so causes damage, although the negligent act is the direct proximate cause of the damage through the fire, which is the visible agency, the insurer is held liable for a loss caused by the fire.⁸ The loss or damage by fire includes

⁷ *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. (U. S.) 213; *Renshaw v. Missouri State Mut. F. & M. Ins. Co.*, 103 Mo. 595, 23 Am. St. Rep. 904; *Scripture v. Lowell Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 356, 57 Am. Dec. 111; *Hillier v. Allegheny County Mut. Ins. Co.*, 3 Pa. St. 470, 45 Am. Dec. 656; *White v. Republic Fire Ins. Co.*, 57 Me. 91; *Dyer v. Piscataqua F. & M. Ins. Co.*, 53 Me. 118; *Miller v. Mutual Ben. Life Ins. Co.*, 31 Iowa, 235; *Prader v. National Masonic Acc. Ass'n*, 55 Iowa, 149, 63 N. W. 601; *Wheeler v. Traders' Ins. Co.*, 62 N. H. 450, 13 Am. St. Rep. 582; *Way v. Abington Mut. Fire Ins. Co.*, 166 Mass. 67, 32 L. R. A. 608.

⁸ *Johnson v. Berkshire Mut. Fire Ins. Co.*, 4 Allen (Mass.), 388;

the whole loss, and is (unless the policy otherwise provides) all covered by a fire policy, where part of a loss is due to an explosion, and part is caused by a fire resulting therefrom.⁹ But damage to a building by concussion, caused by an explosion of gunpowder in another building which resulted from a fire, is not within a policy of insurance against fire.¹⁰ The destruction of merchandise by blowing up a building by gunpowder, to prevent the spread of a conflagration, is a peril insured against if the building would otherwise have burned.¹¹

The Description of the Risk Insured Against.

Only that will be held to be insured which is fairly included within the description contained in the policy. When the terms of the policy are clear as to the property insured, and risk insured against, they cannot be varied by proof, but parol evidence is admissible to prove the identity of the property covered by the policy, if the description be ambiguous.¹² If the description of the property is definite, evidence will not be admitted in an action at law to show that a mistake was made, and that the policy was intended to cover other property.¹³ Reference may sometimes be had to the application

Lynn Gas & Electric Co. v. Meriden Fire Ins. Co., 158 Mass. 570, 20 L. R. A. 297.

⁹ *Scripture v. Lowell Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 356, 57 Am. Dec. 111.

¹⁰ *Caballero v. Home Mut. Ins. Co.*, 15 La. Ann. 217.

¹¹ *Greenwald v. Insurance Co.*, 3 Phila. (Pa.) 323; *City Fire Ins. Co. v. Corlies*, 21 Wend. (N. Y.) 367. See, also, *Beakes v. Phoenix Ins. Co.*, 143 N. Y. 402, 26 L. R. A. 267.

¹² *Graham v. Firemen's Ins. Co.*, 2 Disn. (Ohio) 255; *Soli v. Farmers' Mut. Ins. Co.*, 51 Minn. 24, 52 N. W. 979; *Roots v. Cincinnati Ins. Co.*, 1 Disn. (Ohio) 138; *Lycoming Mut. Ins. Co. v. Sailer*, 67 Pa. St. 108; *Weisenberger v. Harmony F. & M. Ins. Co.*, 56 Pa. St. 442.

¹³ *Holmes v. Charlestown Mut. Fire Ins. Co.*, 10 Metc. (Mass.) 211.

to prove the identity of the property covered;¹⁴ or to usage and custom.¹⁵ A policy upon property described only as "property in freight buildings" will not cover articles of the kind specified in the policy to be not insured, unless by special agreement.¹⁶ The policy may attach to and cover property acquired subsequently to its delivery.¹⁷ Lumber sold, and piled on docks, and marked with the purchaser's name, and to be removed at once, is covered by a policy on property sold but not delivered.¹⁸ A hay press used on a farm is a "farming utensil," but if situated in a stock-yard, at a distance from a building, is not covered by a policy on "farming utensils in buildings on premises."¹⁹ "Binding twine" is covered by a policy on implements and goods kept for sale in a general implement store.²⁰ Where insurance is effected on buildings occupied as stores and shoe factory, an exception from the policy of "store fixtures" does not except fixtures in the factory.²¹ Insurance on fixtures does not cover chairs.²² Milk-cans are included in a policy on a creamery building and merchandise, materials, supplies and packages.²³ The term "grain" includes broom corn in the

¹⁴ *Menk v. Home Ins. Co.*, 76 Cal. 50, 14 Pac. 837.

¹⁵ *Mason v. Skurray*, 2 Bos. & P. (N. R.) 213, note; 1 Park, Ins. 245.

¹⁶ *Com. v. Hide & Leather Ins. Co.*, 112 Mass. 136.

¹⁷ *Davis v. New England Fire Ins. Co.*, 70 Vt. 217, 39 Atl. 1095.

¹⁸ *Michigan Pipe Co. v. Michigan F. & M. Ins. Co.*, 92 Mich. 482, 20 L. R. A. 277. See *Wunderlich v. Palatine Fire Ins. Co.*, 104 Wis. 382, 395, 80 N. W. 467, 471.

¹⁹ *Phoenix Ins. Co. v. Stewart*, 53 Ill. App. 273; *Benton v. Farmers' Mut. Fire Ins. Co.*, 102 Mich. 281.

²⁰ *Davis v. Anchor Mut. Fire Ins. Co.*, 96 Iowa, 70, 64 N. W. 687.

²¹ *Thurston v. Union Ins. Co.*, 17 Fed. 127.

²² *Manchester Fire Assur. Co. v. Feibelman*, 118 Ala. 308, 23 So. 759, 27 Ins. Law J. 855.

²³ *Cronin v. Fire Ass'n of Philadelphia*, 112 Mich. 106, 70 N. W. 448.

bale, but not baled panicles from which the seed has been threshed.²⁴ Furniture stored in a hotel, for use in connection with it, is covered by insurance upon the hotel and furniture, but excepting goods held on storage.²⁵ Grain in stacks does not include unthreshed grain in a mow in a barn.²⁶ A policy covering property of the insured "providing the property hereby insured is on premises owned and occupied by it" does not cover property on premises held by the insured under a lease.²⁷

Household Furniture.

The term "household furniture" includes all articles usually found suitable, necessary and convenient for housekeeping.²⁸ Furniture belonging to a hotel, and stored for use in connection with it, is not within an exception of "goods held on storage."²⁹

Dwelling and Buildings.

A carriage house and stable is covered by a policy "on two-story frame dwelling and addition thereto, with shingle roof, used as a dwelling," etc., where they are under the same roof and over the carriage house is a bed room occupied by a hired

²⁴ *Reavis v. Farmers' Mut. Fire Ins. Co.*, 78 Mo. App. 14.

²⁵ *Continental Ins. Co. v. Pruitt*, 65 Tex. 125.

²⁶ *Benton v. Farmers' Mut. Fire Ins. Co.*, 102 Mich. 281.

²⁷ *Providence & W. R. Co. v. Yonkers Fire Ins. Co.*, 10 R. I. 74. See further, on this question, *Soli v. Farmers' Mut. Ins. Co.*, 51 Minn. 24, 52 N. W. 979; *Hood v. Manhattan Fire Ins. Co.*, 11 N. Y. 532; *Hews v. Atlas Ins. Co.*, 126 Mass. 389; *Hanover Fire Ins. Co. v. Mannasson*, 29 Mich. 316; *Boright v. Springfield F. & M. Ins. Co.*, 34 Minn. 352; *Cargill v. Millers' & M. Mut. Ins. Co.*, 33 Minn. 90; *Everett v. Continental Ins. Co.*, 21 Minn. 76; *Com. v. Hide & Leather Ins. Co.*, 112 Mass. 136.

²⁸ *Reynolds v. Iowa & N. Ins. Co.*, 80 Iowa, 563; *Huston v. State Ins. Co.*, 100 Iowa, 402, 69 N. W. 674.

²⁹ *Continental Ins. Co. v. Pruitt*, 65 Tex. 125; *Clarke v. Firemen's Ins. Co.*, 18 La. 431.

man.³⁰ "Stock contained in a chair factory" covers stock contained in the various buildings that together constitute the factory.³¹ A policy on "gin-house and contents," describing the property insured as "cotton, ginned and unginned, baled and unbaled, in cotton house adjacent to gin-building," covers cotton in the gin-house building, as well as that in the building adjacent to the gin-house.³² A policy upon a house covers the cellar wall of the house.³³ A policy covering all furniture contained in a "certain brick building, and additions attached," includes furniture in a frame building on the next lot, extending over and against the rear of the brick building and used in connection therewith as a store-house, where there is no other building attached or connected.³⁴ Whether counters and shelving in the insured building are covered by a policy, depends upon whether they are movable or immovable fixtures.³⁵ Insurance for a period of years, effected upon a mill-building and machinery, while in process of construction, covers the property when completed as contemplated by the parties when the contract was made.³⁶ The description "three-story granite building" may designate a building with a granite front only, and three stories high in front and rear, though only one story high in the middle.³⁷ Insurance

³⁰ *Hannan v. Williamsburgh City Fire Ins. Co.*, 81 Mich. 556; *White v. Mutual Fire Assur. Co.*, 8 Gray (Mass.), 566.

³¹ *Liebenstein v. Baltic Fire Ins. Co.*, 45 Ill. 301.

³² *Boyd v. Mississippi Home Ins. Co.*, 75 Miss. 47, 21 So. 708, 26 Ins. Law J. 532; *Missouri, K. & T. Ry. Co. v. Union Ins. Co.* (Tex. Civ. App.), 39 S. W. 975.

³³ *Ervin v. New York Cent. Ins. Co.*, 3 N. Y. Sup. Ct. 213.

³⁴ *Maisel v. Fire Ass'n of Philadelphia*, 59 App. Div. 461, 69 N. Y. Supp. 181.

³⁵ *Capital City Ins. Co. v. Caldwell*, 95 Ala. 77, 10 So. 355.

³⁶ *Frost's D. L. & W. W. Works v. Millers' & M. Mut. Ins. Co.*, 37 Minn. 300.

³⁷ *Medina v. Builders' Mut. Fire Ins. Co.*, 120 Mass. 225; *Carr v. Hibernia Ins. Co.*, 2 Mo. App. 466.

on a dwelling house covers a heater built and bricked in.³⁸ A warehouse, used in connection with an elevator building from which grain is transferred through spouts extending from one to the other, is within the description "steam-power elevator building, and additions."³⁹ "Buildings adjoining and communicating, * * * situated detached" means buildings detached from other buildings, and not from each.⁴⁰ "Stock and tools contained in a five-story building" includes stock contained in the cellar of the building.⁴¹ A policy on a brick building attaches to the building as such, and not to the materials composing the building. Where a building, by reason of overloading, or defect in the construction, falls, and fire subsequently occurs in the ruins, the insurers are not liable.⁴²

Stock and Incidents.

The term "stock in trade" when used as a matter of description in an insurance policy, includes, besides the materials used in the business, everything necessary for carrying on that business;⁴³ and entitles the insured to carry articles properly belonging to his business, although these may be forbidden by special provisions of a policy.⁴⁴ "Grain in stack and granary" includes flax seed, and a stack of flax raised for the

³⁸ *Adams v. Greenwich Ins. Co.*, 9 Hun (N. Y.), 45.

³⁹ *Cargill v. Millers' & M. Mut. Ins. Co.*, 33 Minn. 90.

⁴⁰ *Broadwater v. Lion Fire Ins. Co.*, 34 Minn. 465. See, also, *Allen v. Lafayette Ins. Co.*, 34 La. Ann. 763; *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571; *German-American Ins. Co. v. Commercial Fire Ins. Co.*, 95 Ala. 469, 11 So. 117; *Fair v. Manhattan Ins. Co.*, 112 Mass. 320.

⁴¹ *Benedict v. Ocean Ins. Co.*, 31 N. Y. 389.

⁴² *Nave v. Home Mut. Ins. Co.*, 37 Mo. 430.

⁴³ *Wall v. Howard Ins. Co.*, 14 Barb. (N. Y.) 383; *Harper v. Albany Mut. Ins. Co.*, 17 N. Y. 194; *Planters' Mut. Ins. Co. v. Engle*, 52 Md. 468; *Phoenix Ins. Co. v. Favorite*, 49 Ill. 259.

⁴⁴ *Steinbach v. La Fayette Fire Ins. Co.*, 54 N. Y. 90; *Hall v. In-*

seed.⁴⁵ A policy covering merchandise kept for sale covers the additions to it made from time to time, as well as the goods on hand at the time of its issue.⁴⁶ A policy on live stock situated on a certain farm, covers a horse obtained after issuance of the policy, in exchange for one then owned.⁴⁷ The term "merchandise" covers property intended for use, as well as that intended for sale;⁴⁸ and all things which may reasonably be supposed within the contemplation of the parties at the time the policy was issued, and which are commonly used, found, or sold in connection with the business, or incident to it.⁴⁹ A policy covering "fixed and movable machinery, engine lathes and tools" covers also patterns used in molding castings in connection with the business. The word "machinery" includes all the tools and implements used in connection with it.⁵⁰ Insurance on a manufactory will in-

surance Co. of North America, 58 N. Y. 292; *Pindart v. King's County Fire Ins. Co.*, 36 N. Y. 648.

⁴⁵ *Hewitt v. Watertown Fire Ins. Co.*, 55 Iowa, 323.

⁴⁶ *Manchester Fire Assur. Co. v. Feibelman*, 118 Ala. 308, 23 So. 759, 27 Ins. Law J. 855; *American Cent. Ins. Co. v. Rothschild*, 82 Ill. 166; *Whitwell v. Putnam Fire Ins. Co.*, 6 Lans. (N. Y.) 166.

⁴⁷ *Mills v. Farmers' Ins. Co.*, 37 Iowa, 400.

⁴⁸ *Hartwell v. California Ins. Co.*, 84 Me. 524.

⁴⁹ *Firemen's Fund Ins. Co. v. Western Refrigerating Co.*, 162 Ill. 322, 44 N. E. 746; *Georgia Home Ins. Co. v. Allen*, 119 Ala. 436, 23 Ins. Law J. 199, 24 So. 399; *Western Assur. Co. v. Ray* (Ky.), 49 S. W. 326; *Spratley v. Hartford Ins. Co.*, 1 Dill. 392, Fed. Cas. No. 13,256; *Franklin Fire Ins. Co. v. Hewitt*, 3 B. Mon. (Ky.) 231. Compare *Kent v. Liverpool & L. Ins. Co.*, 26 Ind. 294; *Burgess v. Alliance Ins. Co.*, 10 Allen (Mass.), 221; *Bassell v. American Fire Ins. Co.*, 2 Hughes, 531, Fed. Cas. No. 1,094; *Getchell v. Aetna Ins. Co.*, 14 Allen (Mass.), 325; *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. St. 485; *Rafel v. Nashville M. & F. Ins. Co.*, 7 La. Ann. 244; *North American Fire Ins. Co. v. Throop*, 22 Mich. 146.

⁵⁰ *Lovewell v. Westchester Fire Ins. Co.*, 124 Mass. 418; *Buchanan v. Exchange Fire Ins. Co.*, 61 N. Y. 26; *Houghton v. Watertown Fire Ins. Co.*, 131 Mass. 300; *Seavey v. Central Mut. Fire Ins. Co.*, 111 Mass. 540.

clude fixtures and machinery, and the incidents thereto.⁵¹ Smoked meats taken from a smoke-house to a storage room, as fast as they are cured, are contents of a smoke-house within the meaning of a policy, in separate sums, upon a butcher shop and its contents, and the smoke-house and its contents, where the manner of conducting the business was understood by both parties when the insurance was effected.⁵²

Goods in Trust.

A stock of goods in the hands of an agent, for sale on account of the owner, is held in trust by the agent, within the meaning of a policy of insurance covering property owned or held in trust by him.⁵³ "Merchandise held in trust" by warehousemen, is goods entrusted to them for keeping, in the mercantile sense of the term.⁵⁴ It includes goods held by one as bailee,⁵⁵ and goods in pawn,⁵⁶ and goods left with the insured for sale or for rent.⁵⁷

Location of Insured Property.

The location of the property insured is important, and as a rule the insured must show that the property destroyed was, at the time of the fire in the locality or place designated in the

⁵¹ *Sims v. State Ins. Co.*, 47 Mo. 54; *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 553.

⁵² *Graybill v. Penn. Township Mut. Fire Ins. Ass'n*, 170 Pa. St. 75.

⁵³ *Roberts v. Firemen's Ins. Co.*, 165 Pa. St. 55; *Farmers' L. & T. Co. v. Harmony F. & M. Ins. Co.*, 51 Barb. (N. Y.) 33.

⁵⁴ *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527; *Johnson v. Campbell*, 120 Mass. 449; *Grandin v. Rochester German Ins. Co.*, 107 Pa. St. 26; *Thomas v. Cummiskey*, 108 Pa. St. 354.

⁵⁵ *Beidelman v. Powell*, 10 Mo. App. 280.

⁵⁶ *Rafel v. Nashville M. & F. Ins. Co.*, 7 La. Ann. 244.

⁵⁷ *Snow v. Carr*, 61 Ala. 363. See, also, *First Nat. Bank of Waxahachie v. Lancashire Ins. Co.*, 62 Tex. 461; *Mitchell Furniture Co. v. Imperial Fire Ins. Co.*, 17 Mo. App. 627; *Lucas v. Liverpool & L. & G. Ins. Co.*, 23 W. Va. 258; *Strohn v. Hartford Fire Ins. Co.*, 33 Wis. 648; *Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 606.

policy. But where a misdescription of the locality is the result of the negligence or mistake of the insurer, without the knowledge or consent of the insured, this fact may be proved in an action on the policy, without having it reformed.⁵⁸ Insurance on the "contents" of a building, describing them in no other way, will not cover the articles then contained in the building, after they are removed and stored elsewhere;⁵⁹ and a policy on a "steam fire engine, hose-pipe, and hose-cart, while located and contained in the fire engine house, and not elsewhere," does not cover such property while being used in an attempt to extinguish a fire elsewhere.⁶⁰ If the contract limits the liability of the insured, by describing the property as contained in a particular location, the courts cannot extend the rights of the insured, nor the liability of the insurer.⁶¹

Words descriptive of location, may, as to one class of property, or as to one kind of insurance, be treated as a statement of a fact relating to the risk, and as amounting to a condition or stipulation that the property should remain there; while as to another class of property, or as to other kinds of insurance, they might be treated as merely descriptive for the purposes of identification. Regard must always be had to

⁵⁸ *Phenix Ins. Co. v. Allen*, 109 Ind. 273, 10 N. E. 85; *Germania Life Ins. Co. v. Lunkenheimer*, 127 Ind. 536, 26 N. E. 1082; *Baker v. State Ins. Co.*, 31 Or. 41, 48 Pac. 699, 27 Ins. Law J. 86; *Allen v. Home Ins. Co. (Cal.)*, 30 Ins. Law J. 711.

⁵⁹ *Benton v. Farmers' Mut. Fire Ins. Co.*, 102 Mich. 281, 26 L. R. A. 237; *First Nat. Bank of Waxahachie v. Lancashire Ins. Co.*, 62 Tex. 461.

⁶⁰ *L'Anse v. Fire Ass'n of Philadelphia*, 119 Mich. 427, 78 N. W. 465, 43 L. R. A. 838.

⁶¹ *Bahr v. National Fire Ins. Co.*, 80 Hun (N. Y.), 309; *Green v. Liverpool & L. & G. Ins. Co.*, 91 Iowa, 615; *English v. Franklin Fire Ins. Co.*, 55 Mich. 273, 54 Am. Rep. 377.

the facts,⁶² and to what must be deemed to have been within the contemplation of the parties at the inception of the contract.⁶³ Insurance on a harvester "operating in the grain fields, and in transit from place to place in connection with the harvesting," does not cover loss of machine while standing near a blacksmith shop, to which it had been taken for repairs, from a place where it was stored, with intent to take it from the shop directly to the grain fields, as soon as it was repaired.⁶⁴ Horses insured as a part of the contents of a barn, are not covered by the policy while outside of it.⁶⁵ A policy on stable and hacks contained therein does not cover a hack in a repair shop one-eighth of a mile away.⁶⁶ Under a description of goods in the store part of a building, no recovery can be had if the goods be removed to a distant part of the building, used for other purposes, by other persons.⁶⁷ Insurance on property in transit, does not cover it after delivery upon the private track of the consignee.⁶⁸ The words "contained in," as used in a policy of insurance with reference to property insured, constitute a restriction upon the risk.⁶⁹ But these words may also be construed to be merely

⁶² *Niagara Fire Ins. Co. v. Elliott*, 85 Va. 962; *De Graff v. Queen Ins. Co.*, 38 Minn. 501.

⁶³ *Haws v. Fire Ass'n of Philadelphia*, 114 Pa. St. 431; *Peterson v. Mississippi Valley Ins. Co.*, 24 Iowa, 494, 95 Am. Dec. 748.

⁶⁴ *Mawhinney v. Southern Ins. Co.*, 98 Cal. 184.

⁶⁵ *Farmers' Mut. Fire Ins. Co. v. Kryder*, 5 Ind. App. 430, 31 N. E. 851; *British-America Assur. Co. v. Miller*, 91 Tex. 414, 44 S. W. 60.

⁶⁶ *Bradbury v. Fire Ins. Ass'n of England*, 80 Me. 396.

⁶⁷ *Boynton v. Clinton & E. Mut. Ins. Co.*, 16 Barb. (N. Y.) 254; *Harris v. Royal Canadian Ins. Co.*, 53 Iowa, 236.

⁶⁸ *Crew-Levick Co. v. British & Foreign Marine Ins. Co.*, 77 Fed. 858.

⁶⁹ *Maryland Fire Ins. Co. v. Gusdorf*, 43 Md. 506; *Lyons v. Providence Wash. Ins. Co.*, 14 R. I. 109, 51 Am. Rep. 364; *Hews v. Atlas Ins. Co.*, 126 Mass. 389; *Sampson v. Security Ins. Co.*, 133 Mass. 49; *Lycoming County Ins. Co. v. Updegraff*, 40 Pa. St. 311; *Liebenstein v. Aetna Ins. Co.*, 45 Ill. 303; *North American Fire Ins. Co. v.*

descriptive of the risk, and not a promissory stipulation, or a condition that the location shall remain unchanged. The question often is not so much as to the binding effect of the description of the property, or the location, as it is what place or premises the description is intended to cover, and as to the interpretation which will best effectuate the evident intention of the parties to the contract at the time of making it.⁷⁰ Insurance on a horse against loss by lightning while in use on the owner's farm, is not limited to a loss happening on the farm owned by the insured when the insurance was effected;⁷¹ and insurance on a phaeton, described as "contained in a barn," has been held to cover it while at a carriage shop for repairs.⁷²

Explosion.

Insurance against loss by fire includes all loss from explosions which are the direct result of an antecedent fire, unless the provisions of the policy specifically exempt the in-

Throop, 22 Mich. 146, 7 Am. Rep. 638; *Towne v. Fire Ass'n of Philadelphia*, 27 Ill. App. 433.

⁷⁰ *Sawyer v. Dodge County Mut. Ins. Co.*, 37 Wis. 503; *Haws v. Fire Ass'n of Philadelphia*, 114 Pa. St. 431; *Minneapolis Threshing Mach. Co. v. Firemen's Ins. Co.*, 57 Minn. 35, 23 L. R. A. 576; *Soli v. Farmers' Mut. Ins. Co.*, 51 Minn. 24; *De Graff v. Queen Ins. Co.*, 38 Minn. 501.

⁷¹ *Boright v. Springfield F. & M. Ins. Co.*, 34 Minn. 352; *Peterson v. Mississippi Valley Ins. Co.*, 24 Iowa, 494.

⁷² *McCluer v. Girard F. & M. Ins. Co.*, 43 Iowa, 349; *Longueville v. Western Assur. Co.*, 51 Iowa, 553; *Trade Ins. Co. v. Barraclof*, 45 N. J. Law, 543. See, also, *Noyes v. Northwestern Nat. Ins. Co.*, 64 Wis. 415, 54 Am. Rep. 631, where a company, which had assured a dolman as wearing apparel, and described by the policy as contained in a designated dwelling house, was held liable for its loss while at a store for repairs; and *Niagara Fire Ins. Co. v. Elliott*, 85 Va. 962, where carriages, described in a policy as contained in a certain building, used for livery stables, were held to be covered while in the shop for repairs, *Everett v. Continental Ins. Co.*, 21 Minn. 76.

surer from loss and damage caused by explosion.⁷³ Where the policy provides that the insurer is not to be liable for any loss which occurs by explosion, it has been decided in several instances that the insurer is not liable for any loss by fire which occurs by reason of the explosion.⁷⁴ But in *Commercial Ins. Co. v. Robinson*,⁷⁵ it was held that the condition secured the exemption from loss caused by explosion, but not from liability for loss by fire caused by explosion. Under a stipulation that there should be no liability for loss by lighting or explosion unless fire ensues, and then for loss or damage by fire only, the insurer is liable for loss resulting from an explosion caused by a fire which broke out in the insured premises.⁷⁶ An exemption from liability for loss by explosions of any kind, does not include a loss of a property insured by fire resulting from the explosion of a lighted lamp.⁷⁷ Where a policy provides that the insurer shall not be liable for loss caused by explosion of any kind, unless fire ensues, and then for loss by fire only, and an explosion destroys the building, after which a fire occurs, the insurer is only liable for the loss caused by the fire.⁷⁸ Damage caused by the explosion of a cloud of starch dust, arising from starch in a dextrine kiln, upon which a stream from an extinguisher is turned in an attempt to put out the fire, which is burning in some charged starch in the kiln, is a loss by fire, and is not

⁷³ *Renshaw v. Fireman's Ins. Co.*, 33 Mo. App. 394; *Commercial Ins. Co. v. Robinson*, 64 Ill. 265.

⁷⁴ *Briggs v. North American & M. Ins. Co.*, 53 N. Y. 446; *United L. F. & M. Ins. Co. v. Foote*, 22 Ohio St. 340; *Mutual Ins. Co. v. Tweed*, 7 Wall. (U. S.) 44.

⁷⁵ 64 Ill. 265.

⁷⁶ *Washburn v. Miami Valley Ins. Co.*, 2 Fed. 633.

⁷⁷ *Heffron v. Kittanning Ins. Co.*, 132 Pa. St. 580.

⁷⁸ *Briggs v. North American & M. Ins. Co.*, 53 N. Y. 446; *Briggs v. North British Mercantile Ins. Co.*, 66 Barb. (N. Y.) 325.

covered by a policy of insurance against explosion and accident, which expressly excludes liability for loss or damage by fire, resulting from any cause whatever.⁷⁹ Damage to goods by an explosion of gas is not a loss by fire, within the meaning of an insurance policy, where the goods were not burned, but damaged by the falling of a floor caused by the explosion, although the explosion was produced by the lighting of a match.⁸⁰

As to explosions caused by the progress of a precedent fire, the cases generally hold that where a fire, the effects of which are covered by a policy, has occurred, and is in progress, and an explosion takes place as a result of the fire, thereby increasing the loss, the whole damage is within the risk insured, although the policy exempts the insurer from liability caused by explosions. But it is otherwise if the explosion was not caused by a preceding fire.⁸¹ The insurer is liable for the destruction of goods caused by the blowing up with gunpowder of the building in which they were situated, by order of the municipal authorities, for the purpose of preventing a

- ⁷⁹ *American Steam Boiler Ins. Co. v. Chicago Sugar Refining Co.* (C. C. A.), 57 Fed. 294.

⁸⁰ *Heuer v. Northwestern Nat. Ins. Co.*, 144 Ill. 393, 19 L. R. A. 594.

⁸¹ *La Force v. Williams City Fire Ins. Co.*, 43 Mo. App. 518; *Trans-Atlantic Fire Ins. Co. v. Dorsey*, 56 Md. 70, 40 Am. Rep. 403. See, also, as to loss by explosion, *John Davis & Co. v. Insurance Co. of North America*, 115 Mich. 382, 73 N. W. 393; *Scripture v. Lowell Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 356, 57 Am. Dec. 111; *Caballero v. Home Mut. Ins. Co.*, 15 La. Ann. 217; *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. (U. S.) 213; *Dows v. Faneuil Hall Ins. Co.*, 127 Mass. 346, 34 Am. Rep. 384; *Boatman's F. & M. Ins. Co. v. Parker*, 23 Ohio St. 85, 13 Am. Rep. 228; *Imperial Fire Ins. Co. v. American M. U. Exp. Co.*, 95 U. S. 227; *Renshaw v. Missouri State Mut. F. & M. Ins. Co.*, 103 Mo. 595, 23 Am. St. Rep. 904; *Hillier v. Allegheny County Mut. Ins. Co.*, 3 Pa. St. 470, 45 Am. Dec. 656; *Lynn Gas & Electric Co. v. Meriden Fire Ins. Co.*, 158 Mass. 570, 20 L. R. A. 297.

spread of the conflagration, unless specially exempted therefrom.⁸²

Fallen Walls and Building.

If, under a policy providing that if the building insured shall fall, except by fire, the insurance shall cease, a minor portion of the walls fall, the building has not fallen within the meaning of the policy, and if destroyed by fire while in that condition, the insurer is liable for the loss.⁸³ Otherwise if the greater portion of the walls fall before the fire begins.⁸⁴ The words "if a building shall fall except as a result of fire the insurance by this company shall immediately cease and determine" are to be given their ordinary meaning, and so long as the building stands, no matter how much it may be damaged, the liability of the insurer remains.⁸⁵ Where a building adjacent to the one insured (the wall between them being a partition wall) caught fire and was partially consumed, and as the direct result of such fire fell, carrying with it the partition wall and a part of the insured building, the fall of the insured building was the result of, and a direct loss or damage by fire, although no part of it ignited or was consumed.⁸⁶

⁸² City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367, 34 Am. Dec. 258; Greenwald v. Insurance Co., 3 Phila. (Pa.) 323; Phillips v. Protection Ins. Co., 14 Mo. 220.

⁸³ Breuner v. Liverpool & L. & G. Ins. Co., 51 Cal. 101, 21 Am. Rep. 703.

⁸⁴ Huck v. Globe Ins. Co., 127 Mass. 306, 34 Am. Rep. 373.

⁸⁵ Fireman's Fund Ins. Co. v. Congregation Rodeph Sholom, 80 Ill. 558.

⁸⁶ Ermentrout v. Girard F. & M. Ins. Co., 63 Minn. 305, 30 L. R. A. 346. See, also, Cuesta v. Royal Ins. Co., 98 Ga. 720, 27 S. E. 172; Teutonia Ins. Co. v. Beard, 74 Ill. App. 496; Lewis v. Springfield F. & M. Ins. Co., 10 Gray (Mass.), 159; Nave v. Home Mut. Ins. Co., 37 Mo. 430.

Removal of Goods.

Where a policy requires the assured, in case of exposure of goods to loss or damage by fire, to use all possible diligence to preserve his goods, and provides in case of his failure to do so that the insurer shall not be liable for the consequences of his neglect, if the assured removes the goods, the circumstances at the time of the removal must determine the necessity therefor, and if the removal was justifiable he is entitled to recover the expense of removal, and consequent loss or damage.⁸⁷ The inquiry should be, what was prudent, and seemingly required, on the part of the insured, from the impending peril at the time of the removal.⁸⁸

Loss by Lightning.

Lightning, in its ordinary and popular meaning, includes any sudden and violent discharge of electricity, occurring in the course of nature, between positively and negatively electrified bodies, usually developing in its course the phenomena of light, heat, and disruptive force.⁸⁹ In the absence of stipulations to the contrary, damage caused by lightning, which produces ignition, is covered by an insurance against fire. Otherwise if no combustion ensues.⁹⁰ Damages on a building shattered by lightning, and the destruction of which is completed by the wind, must be limited to the direct loss caused by lightning, excluding the additional damage,

⁸⁷ *Case v. Hartford Fire Ins. Co.*, 13 Ill. 676, 3 Bennett Fire Ins. Cas. 349.

⁸⁸ *Lieber v. Liverpool, L. & G. Ins. Co.*, 6 Bush (Ky.), 639, 99 Am. Dec. 695. See, also, *White v. Republic Fire Ins. Co.*, 57 Me. 91, 2 Am. Rep. 22; *Cincinnati Mut. Ins. Co. v. May*, 20 Ohio, 212; *Bales-tracci v. Firemen's Ins. Co.*, 34 La. Ann. 844; *Holtzman v. Franklin Ins. Co.*, 4 Cranch, C. C. 295, Fed. Cas. No. 6,649.

⁸⁹ *Spensley v. Lancashire Ins. Co.*, 54 Wis. 433.

⁹⁰ *Kenniston v. Merrimack County Mut. Ins. Co.*, 14 N. H. 341, 40 Am. Dec. 193; *Babcock v. Montgomery County Mut. Ins. Co.*, 4 N. Y. 326; *Scripture v. Lowell Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 360.

where the policy covers damage by lightning, and expressly excludes damage by cyclone, tornado or wind storm.⁹¹ Damage caused by lightning striking a powder house, which explodes and destroys the insured premises, is not covered by a policy against damage caused by lightning, and excluding loss caused by explosion.⁹²

Damage by Water.

The insurer is liable for damage caused by water thrown or used in an endeavor to save and protect the insured property,⁹³ but not for damage resulting from failure of the insured to properly care for the damaged property after it had been wet, where the policy requires him to use his best endeavors to protect the property from damage at and after the fire, and exempting the company from liability caused by his failure so to do.⁹⁴

Wind, Tornado and Hurricane.

A policy insuring against damage by lightning, but expressly excluding all damage by cyclone, tornado or wind storm, does not cover the additional damage done by wind after the building has been shattered by lightning.⁹⁵ It would seem within the rules above laid down, that an insurer will be liable for damage caused by the blowing down of walls which have been weakened by the peril insured against; but the contrary has been held.⁹⁶

⁹¹ *Beakes v. Phoenix Ins. Co.*, 143 N. Y. 402, 26 L. R. A. 267.

⁹² *German Fire Ins. Co. v. Roost*, 55 Ohio St. 581, 45 N. E. 1097.

⁹³ *Whitehurst v. Fayetteville Mut. Ins. Co.*, 6 Jones (N. C.), 352; *Geisek v. Crescent Mut. Ins. Co.*, 19 La. Ann. 297; *New York & B. D. Express Co. v. Traders' & M. Ins. Co.*, 132 Mass. 381. But see *Cannon v. Phoenix Ins. Co.*, 110 Ga. 563, 35 S. E. 775.

⁹⁴ *Sisk v. Citizens' Ins. Co.*, 16 Ind. App. 565, 45 N. E. 804.

⁹⁵ *Beakes v. Phoenix Ins. Co.*, 143 N. Y. 402, 26 L. R. A. 267.

⁹⁶ *Gaskarth v. Law Union Fire Ins. Co. (Manchester)*, 6 Ins. Law

Smoke.

An insurance against "all direct loss or damage by fire" does not cover damage arising from smoke and soot escaping from a defective stove-pipe, and coming from a fire intentionally built in a stove, and kept confined therein; nor damage caused by water used in cooling the ceiling, heated by the pipe, if no actual ignition takes place, unless the water was necessary to prevent ignition.⁹⁷ An ordinary fire insurance policy does not cover a loss caused by steam escaping from a break in a steam heating apparatus. The word fire does not include heat of a degree too low to cause ignition.⁹⁸ But damage done by smoke resulting from actual ignition of the insured property, would be the direct and proximate result of fire.

Loss by Theft.

An ordinary fire policy covers loss by theft during the progress of a fire in the insured building;⁹⁹ and loss by theft, which occurs during a necessary and prudent removal of goods to save them from impending destruction from a fire in the adjoining building.¹⁰⁰ Sometimes the policy expressly excludes loss by theft during the fire.¹⁰¹ A stipulation that the insurer will not "be liable for any loss or damage to goods contained in the show window when the loss or damage is caused by the light in the show window, nor shall the company be liable for loss by theft," applies to theft from the show

J. 159. See, also, *Pelican Ins. Co. v. Troy Co-operative Ass'n*, 77 Tex. 225.

⁹⁷ *Cannon v. Phoenix Ins. Co.*, 110 Ga. 563, 35 S. E. 775.

⁹⁸ *Gibbons v. German Ins. & Sav. Institution*, 30 Ill. App. 263.

⁹⁹ *Tilton v. Hamilton Fire Ins. Co.*, 1 Bosw. (N. Y.) 367.

¹⁰⁰ *Newmark v. Liverpool & L. F. & L. Ins. Co.*, 30 Mo. 160, 77 Am. Dec. 608; *Whitehurst v. Fayetteville Mut. Ins. Co.*, 6 Jones (N. C.), 352; *Talamon v. Home & Citizens' Mut. Ins. Co.*, 16 La. Ann. 426.

¹⁰¹ *Webb v. Protection & A. Ins. Co.*, 14 Mo. 3; *Fernandez v. Merchants' Mut. Ins. Co.*, 17 La. Ann. 131.

windows, and not to theft committed in the necessary removal of the goods, to save them from an impending fire.¹⁰²

Riot, Mobs, etc.

An exemption from liability for loss by fire caused by mobs or riots, does not include the destruction of a bridge by order of the military authorities to prevent the advance of an army;¹⁰³ nor the burning of goods to prevent them from falling into the hands of rebels.¹⁰⁴ But an exemption from liability for fire which happened by means of invasion or military or usurped power, relieves the insurer where the property is seized and burned by rebels;¹⁰⁵ or by a mob during a riot.¹⁰⁶

Fraud and Negligence.

The doctrine appears to be well settled by the authorities that a loss by fire occasioned by the mere fault and negligence of the insured party, his servants or agents, without fraud, is a loss protected by the policy, and as such recoverable from

¹⁰² *Leiber v. Liverpool, L. & G. Ins. Co.*, 6 Bush (Ky.), 639, 99 Am. Dec. 695. The value of insured goods, lost or stolen while being removed from a burning building, may be recovered in an action on the policy. *Independent Mut. Ins. Co. v. Agnew*, 34 Pa. St. 96, 75 Am. Dec. 638.

¹⁰³ *Harris v. York Mut. Ins. Co.*, 50 Pa. St. 341.

¹⁰⁴ *Boon v. Aetna Ins. Co.*, 40 Conn. 575.

¹⁰⁵ *Barton v. Home Ins. Co.*, 42 Mo. 156, 97 Am. Dec. 329.

¹⁰⁶ *Langdale v. Mason*, 2 Marshall, Ins. 792. See, also, on this question, *Portsmouth Ins. Co. v. Reynolds' Adm'r*, 32 Grat. (Va.) 613; *Strauss v. Imperial Fire Ins. Co.*, 16 Mo. App. 555, 94 Mo. 182, 4 Am. St. Rep. 368; *Aetna Fire Ins. Co. v. Boon*, 95 U. S. 117; *Lycoming Fire Ins. Co. v. Schwenk*, 95 Pa. St. 89, 40 Am. Rep. 629; *Dupin v. Mutual Ins. Co.*, 5 La. Ann. 482; *Germania Fire Ins. Co. v. Deckard*, 3 Ind. App. 361, 23 N. E. 868; *City Fire Ins. Co. v. Corlies*, 21 Wend. (N. Y.) 367, 34 Am. Dec. 258. In *Field v. City of Des Moines*, 39 Iowa, 575, 18 Am. Rep. 46, it was held that a city was not liable for buildings destroyed by its officers, to prevent the spread of a fire.

the insurer.¹⁰⁷ Generally speaking, before negligence is available as a ground of defense, there must be evidence of such a degree of negligence as will evince a corrupt design.¹⁰⁸ If, however, the negligence is so culpable as to amount to fraud or positive misconduct, the insurer is not liable.¹⁰⁹ An insured who fails to put out a fire when he can, is guilty of corrupt negligence. Where he prevents others from putting it out he is guilty of such fraudulent misconduct as will prevent a recovery.¹¹⁰ The insurer cannot be held for damage caused by the negligence of the insured, where due care and reasonable effort to save and protect from damage are required of him.¹¹¹

¹⁰⁷ *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. (U. S.) 213; *General Mut. Ins. Co. v. Sherwood*, 14 How. (U. S.) 351, 3 Kent, Comm. 376; *Gove v. Farmers' Mut. Fire Ins. Co.*, 48 N. H. 41, 97 Am. Dec. 572.

¹⁰⁸ *Catlin v. Springfield Fire Ins. Co.*, 1 Sumn. 434, Fed. Cas. No. 2,522; *Hynds v. Schenectady County Mut. Ins. Co.*, 16 Barb. (N. Y.) 119; *Chandler v. Worcester Mut. Fire Ins. Co.*, 3 Cush. (Mass.) 328; *Williams v. New England Mut. Fire Ins. Co.*, 31 Me. 219; *Huckins v. People's Mut. Fire Ins. Co.*, 31 N. H. 238; *Franklin Ins. Co. v. Humphrey*, 65 Ind. 557; *Gates v. Madison County Mut. Ins. Co.*, 5 N. Y. 469, 55 Am. Dec. 360; *Mathews v. Howard Ins. Co.*, 11 N. Y. 9.

¹⁰⁹ *Citizens' Ins. Co. v. Marsh*, 41 Pa. St. 386; *Gove v. Farmers' Mut. Fire Ins. Co.*, 48 N. H. 41, 97 Am. Dec. 572; *Western Horse & Cattle Co. v. O'Neill*, 21 Neb. 548; *Chandler v. Worcester Mut. Fire Ins. Co.*, 3 Cush. (Mass.) 328, and cases ante. See, also, *Perry v. Mechanics' Mut. Ins. Co.*, 11 Fed. 478; *Feibelman v. Manchester Fire Assur. Co.*, 108 Ala. 180, 19 So. 540; *Ellsworth v. Aetna Ins. Co.*, 89 N. Y. 186; *Adair v. Southern Mut. Ins. Co.*, 107 Ga. 297, 45 L. R. A. 204.

¹¹⁰ *Phoenix Ins. Co. v. Mills*, 77 Ill. App. 546; *Willis v. Germania & Hanover Fire Ins. Co.*, 79 N. C. 285.

¹¹¹ *Sisk v. Citizens' Ins. Co.*, 16 Ind. App. 565, 45 N. E. 804; *Ellsworth v. Aetna Ins. Co.*, 89 N. Y. 186; *Campbell v. Monmouth Mut. Fire Ins. Co.*, 59 Me. 430; *Wolters v. Western Assur. Co.*, 95 Wis. 265, 70 N. W. 62; *Case v. Hartford Fire Ins. Co.*, 13 Ill. 676; 3 *Bennett Fire Ins. Cas.* 551; *Devlin v. Queen Ins. Co.*, 46 Up. Can. Q. B. 611; *Leiber v. Liverpool, L. & G. Ins. Co.*, 6 Bush (Ky.), 639, 99 Am. Dec. 695.

*Life and Accident Risks.***The Risk — Proximate Cause.**

In policies of insurance against perils or events other than fire, the same rule concerning direct and immediate, or proximate cause and result obtains. In life policies the liability of the insurer is usually fixed and certain. In accident policies it is often necessary to investigate the law of cause and effect. When the damage in any particular case is a direct and inevitable consequence of the occurrence of the peril insured against, the insurers are liable, though the immediate agent was not such peril. All the consequences flowing from the peril insured against, or incident thereto, are properly attributable to the peril itself. Thus, if a physical condition is the result of an accident which makes necessary a surgical operation resulting in death, the accident, and not the operation, is the proximate cause of death.¹¹² A pistol wound causing tetanus, with great bodily pain, and delirium or fever, may be found to be the proximate cause of death, where a person insured against accidents, excluding suicide, sane or insane, cuts his throat in a period of delirium or state of frenzy which is uncontrollable.¹¹³ So death from apoplexy, result-

¹¹² *Travelers' Ins. Co. v. Murray*, 16 Colo. 296.

¹¹³ *Travelers' Ins. Co. v. Melick* (C. C. A.), 65 Fed. 178. In the opinion, Judge Sanborn said: "In this case the sequence of events is neither unnatural nor improbable, and the chain of causation seems to us unbroken. It was not unnatural nor improbable that the shot-wound in the foot should produce great pain and fever. It was not unnatural nor improbable that it should produce tetanus, and that tetanus should produce uncontrollable pain, fever, and delirium. It was neither unnatural nor improbable that a man in the torture of uncontrollable agony, and in a delirium or fever, should be irresistibly impelled to do himself an injury in an attempt to abate his suffering, or that if he was a physician, and familiar with the use of a scalpel, near at hand, he should seize and use that to relieve his pain. * * * The jury * * * might well

ing from external, visible and bodily injury, occasioned by an accident, is the result of such accident.¹¹⁴ And death from blood poisoning, if the result of the inoculation of some substance into a wound at the time of an accident which causes the wound, is the result of the accident.¹¹⁵ The assault on a woman by a drunken man who is killed by her husband in defending her, is the proximate cause of his death, within a stipulation excepting liability for death in violation of law.¹¹⁶ And engaging in a horse race is the proximate cause of the death of one killed in a collision during the race;¹¹⁷ and an accidental fall, causing peritonitis which results in death is the proximate cause of the death.¹¹⁸

Accidental death by drowning is caused indirectly by disease, within the meaning of an exception against death caused directly or indirectly by disease, if the drowning is the result of a fall into the water, and the fall is the result of the

find that the shot-wound was the efficient cause which set in motion the train of events that in their natural sequence produced the cutting and the death, the *causa causans*, without which neither would have been. * * * In the absence of the shot-wound, the cutting would never have been. That was dependent entirely for its existence and for its effect upon the original accident, and was a mere link in the chain of causation between that and the death. The intervening cause that will prevent a recovery for a death which resulted from an accidental bodily injury, indemnified against by contract, must be a new and independent cause, which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original accidental injury, and produces a different result that could not reasonably be anticipated. It may not be a mere effect of that injury, produced by it, and dependent upon it for both its existence and its effect,"—citing *Milwaukee & St. P. Ry. Co. v. Kellogg*, 94 U. S. 469.

¹¹⁴ *National Ben. Ass'n v. Grauman*, 107 Ind. 288, 7 N. E. 233.

¹¹⁵ *Martin v. Equitable Acc. Ass'n*, 61 Hun (N. Y.), 467.

¹¹⁶ *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478, 49 Am. Rep. 469.

¹¹⁷ *Travellers' Ins. Co. v. Seaver*, 19 Wall. (U. S.) 531.

¹¹⁸ *Freeman v. Mercantile Mut. Acc. Ass'n*, 156 Mass. 351, 17 L. R. A. 753.

disease.¹¹⁹ But intoxication is not necessarily the proximate cause of the death of one who is killed by being thrown from a wagon while intoxicated.¹²⁰ One killed after he has desisted from an encounter, and while he was retreating, does not die in violation of law.¹²¹ Where one is trying to take a team of horses from another for debt, and is killed in so doing, the question of proximate cause is for the jury.¹²²

An employe of a railway company, while going home immediately after quitting work, is still in the discharge of his duties, and in the service of the company, within the meaning of a contract insuring him while in the discharge of his duty.¹²³ If two parties willingly engage in an encounter, death resulting therefrom is not covered by an accident policy which excepts from the risks death or injury caused by a fight.¹²⁴ The words "total and permanent loss of sight of both eyes," mean the loss of eyesight which the insured had when the policy was written.¹²⁵ The tearing off of three fingers, and part of another, and the cutting of the hand, destroying the joint of the thumb, may be found by a jury to constitute a loss of the hand within the meaning of an accident policy.¹²⁶ Where the provisions of a policy have, prior to its issuance,

¹¹⁹ *Manufacturers' Acc. Ind. Co. v. Dorgan* (C. C. A.), 58 Fed. 945.

¹²⁰ *National Ben. Ass'n v. Bowman*, 110 Ind. 355.

¹²¹ *Harper's Adm'r v. Phoenix Ins. Co.*, 19 Mo. 506.

¹²² *Bradley v. Mutual Ben. Life Ins. Co.*, 45 N. Y. 422.

¹²³ *Kinney v. Baltimore & O. E. R. Ass'n*, 35 W. Va. 385, 15 L. R. A. 142.

¹²⁴ *Gresham v. Equitable Acc. Ins. Co.*, 87 Ga. 497, 13 L. R. A. 833.

¹²⁵ *Humphreys v. National Ben. Ass'n*, 139 Pa. St. 264, 11 L. R. A. 564. Compare *Maynard v. Locomotive E. Mut. Life & Acc. Ins. Ass'n*, 16 Utah, 145, 51 Pac. 259, 27 Ins. Law J. 208.

¹²⁶ *Lord v. American Mut. Acc. Ass'n*, 89 Wis. 19. As to loss of foot, see *Stevens v. People's Mut. Acc. Ins. Ass'n*, 150 Pa. St. 132, 16 L. R. A. 446; two entire feet, *Sheanon v. Pacific Mut. Life Ins. Co.*, 77 Wis. 618, 9 L. R. A. 685; loss of sight of both eyes, *Humphreys v. National Ben. Ass'n*, 139 Pa. St. 264, 11 L. R. A. 564.

been given a uniform judicial construction by the courts of last resort of several states, it will be presumed that that interpretation of the contract was intended by the parties to it.¹²⁷ An injury received by a workman in iron and steel works, though caused by the negligence of an independent crew engaged in erecting an addition to the works where he was employed, is included within the liability under a policy covering injuries in "all operations connected with the business of iron and steel works."¹²⁸ The term "voluntary over-exertion" means conscious or intentional over-exertion, or a reckless disregard of the probable consequences of the act.¹²⁹ A certificate of membership in an organization guaranteeing payment of a given sum in case of death or total disability, will be construed as an ordinary contract of insurance against death and total disability from whatever cause.¹³⁰

Accident.

The word "accident," when used to express a result produced by human action, is generally understood to mean a thing done, or a condition caused or produced without design, or unintentional. It includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby. It is an unexpected event, which happens as by chance, or which does not take place according to the usual course of things. "Accidental" signifies happening by chance, or unexpectedly, taking place not according to the usual course of things, casual, fortuitous; the opposite of "accident" is design, volition, intent. The term "accidental" is used in insurance in its ordinary,

¹²⁷ *Fidelity & Casualty Co. v. Lowenstein* (C. C. A.), 97 Fed. 17.

¹²⁸ *Hoven v. Employers' Liability Assur. Corp.*, 93 Wis. 201.

¹²⁹ *Rustin v. Standard Life & Acc. Ins. Co.*, 58 Neb. 792, 79 N. W. 712, 46 L. R. A. 253.

¹³⁰ *Murphy v. Skyles*, 101 Iowa, 549, 70 N. W. 714.

popular sense. If a result is such as follows from ordinary means, voluntarily employed, in a not unusual way, it cannot be called a result effected by accidental means. But if, in the act which precedes an injury, something unforeseen, unexpected, unusual, occurs which produces injury, then the injury has resulted from accidental means.¹³¹ It may include an injury received in a common-law affray, without the fault of the person injured.¹³² An injury not anticipated, and not naturally to be expected by the insured, though intentionally inflicted by another, is accidental;¹³³ and death by hanging at the hands of a mob;¹³⁴ and an abrasion of the skin of a toe, unexpectedly caused by the wearing of a new shoe;¹³⁵ and an involuntary death by drowning;¹³⁶ and the death of a person who is shot by one whom he is trying to eject by force from a hotel office, where the deceased made the attempt without knowledge that the aggressor was armed;¹³⁷ and death resulting from the excitement of a runaway;¹³⁸ and death from blood-poisoning superinduced by the sting of an insect.¹³⁹ But the death of one caused

¹³¹ United States Mut. Acc. Ass'n v. Barry, 131 U. S. 100; Bostwick v. Stiles, 35 Conn. 198; Schneider v. Provident Life Ins. Co., 24 Wis. 30; Paul v. Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 349; North American L. & A. Ins. Co. v. Burroughs, 69 Pa. St. 43; Railway Officials' & Employees' Acc. Ass'n v. Drummond, 56 Neb. 235, 76 N. W. 562, 50 Cent. Law J. 5.

¹³² Supreme Council, O. C. F., v. Garrigus, 104 Ind. 133.

¹³³ Accident Ins. Co. of North America v. Bennett, 90 Tenn. 256.

¹³⁴ Fidelity & Casualty Co. v. Johnson, 72 Miss. 333, 30 L. R. A. 206.

¹³⁵ Western Commercial Travelers' Ass'n v. Smith (C. C. A.), 85 Fed. 401.

¹³⁶ Peele v. Provident Fund Soc., 147 Ind. 543, 44 N. E. 661.

¹³⁷ Lovelace v. Travelers' Protective Ass'n, 126 Mo. 104.

¹³⁸ McGlinchey v. Fidelity & Casualty Co., 80 Me. 251.

¹³⁹ Omberg v. United States Mut. Acc. Ass'n, 101 Ky. 303, 40 S. W. 909.

by a duel is not accidental;¹⁴⁰ nor death resulting from a rupture of an artery caused by one attempting to close a window, if he did not fall, slip, or lose his balance.¹⁴¹ The death of a horse was not caused by disease or accident, where it was suffering from an incurable disease, and was killed two hours before the expiration of the policy, but its death was not required as an act of mercy to relieve its suffering.¹⁴² The law will presume that an injury was not self-inflicted;¹⁴³ but in an action on an accident policy the plaintiff must prove by preponderance of the evidence that the injury was accidental, because the policy only insures against such injury, and he who affirms must prove.¹⁴⁴

¹⁴⁰ *Taliaferro v. Travelers' Protective Ass'n*, 80 Fed. 368, 49 U. S. App. 275.

¹⁴¹ *Feder v. Iowa State T. M. Ass'n*, 107 Iowa, 538, 78 N. W. 252.

¹⁴² *Tripp v. Northwestern Live Stock Ins. Co.*, 91 Iowa, 278, 59 N. W. 1. See, also, *Klopp v. Bernville Live Stock Ins. Co.*, 1 Woodw. (Pa.) 445.

¹⁴³ *Carnes v. Iowa State T. M. Ass'n*, 106 Iowa, 281, 76 N. W. 683.

¹⁴⁴ *Greenleaf, Ev.* (13th Ed.) 83; *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661; *Whitlatch v. Fidelity & Casualty Co.*, 149 N. Y. 45, 43 N. E. 405.

"A person might voluntarily and knowingly expose himself to a contagious disease, or to excessive heat or cold, or to sudden changes of temperature, or might adopt a strange diet or mode of living, but, if death resulted, it would not be due to an accidental cause, although wholly undesigned, unforeseen, and unexpected. So, if a person suffering from some weakness or disease should subject himself to conditions which would not injuriously affect persons in ordinary health, but would be dangerous to him, and injury result, it would not be due to an accidental cause. For example, if a person having a diseased heart should take violent exercise voluntarily, and death should result, the cause would not be accidental. * * * Although a result may not be designed, foreseen, or expected, yet if it be the natural and direct effect of acts voluntarily done, or of conditions voluntarily assumed, it cannot be said to be accidental." *Feder v. Iowa State T. M. Ass'n*, 107 Iowa, 538, 78 N. W. 252; *Southard v. Railway Passengers' Ass'n Co.*, 34 Conn. 574; *Bacon v. United States Mut. Acc. Ass'n*, 123 N. Y. 304, 25 N. E. 399.

External, Violent, and Accidental Means.

Suicide by an insane person is within the terms of a policy insuring against bodily injuries effected through external, violent, and accidental means, even though death or disability by suicide of self-inflicted injuries be excepted;¹⁴⁵ and death from asphyxiation, caused by deadly gas in a shallow well into which the assured descends to fix a pump;¹⁴⁶ and death by unconsciously and unintentionally inhaling gas while asleep;¹⁴⁷ and the intentional killing of one by another without any fault or expectation of the former;¹⁴⁸ and death at the hands of a mob;¹⁴⁹ and death produced by the accidental drinking of poison;¹⁵⁰ and death by choking on food, which, in an attempt to swallow it, accidentally passes into the wind-pipe. The means which caused the injury, and not the injury itself, are referred to. It must be shown that the death was the result not only of external and violent, but of accidental means as well.¹⁵¹

Under a policy insuring against bodily injury caused by

¹⁴⁵ *Accident Ins. Co. v. Crandal*, 120 U. S. 527. Otherwise if the policy exempted death by his own hand, sane or insane: *Streeter v. Western Union Mut. L. & A. Soc.*, 65 Mich. 199, 31 N. W. 779.

¹⁴⁶ *Pickett v. Pacific Mut. Life Ins. Co.*, 144 Pa. St. 79, 13 L. R. A. 661.

¹⁴⁷ *Fidelity & Casualty Co. v. Lowenstein (C. C. A.)*, 97 Fed. 17.

¹⁴⁸ *American Acc. Co. v. Carson*, 99 Ky. 441, 36 S. W. 169, 25 Ins. Law J. 786.

¹⁴⁹ *Fidelity & Casualty Co. v. Johnson*, 72 Miss. 333.

¹⁵⁰ *Healey v. Mutual Acc. Ass'n*, 133 Ill. 556, 9 L. R. A. 371.

¹⁵¹ *American Acc. Co. v. Reigart*, 94 Ky. 547. See, also, *Meyer v. Fidelity & Casualty Co.*, 96 Iowa, 378, 65 N. W. 328, 25 Ins. Law J. 346 (injury from a fall due to a temporary and unexpected disorder); *United States Mut. Acc. Ass'n v. Hubbell*, 56 Ohio St. 516, 47 N. E. 544 (death by accidental drowning); *Omberg v. United States Mut. Acc. Ass'n*, 101 Ky. 303 (death from poison caused by sting of an insect); *Standard Life & Acc. Ins. Co. v. Schmaltz*, 65 Ark. 588, 53 S. W. 49 (the rupture of a blood vessel in the stomach, causing death, and resulting from a sudden wrench of the body).

external, violent, and accidental means, in case of death from such injuries independent of all other causes, and exempting the insurer from liability for injuries, fatal or otherwise, resulting wholly or in part from poison, or anything accidentally or otherwise taken, administered, or inhaled, it is held that death caused by blood-poisoning from the effects of the absorption into the system of septic poison, evolved by the propagation of germs in cotton, inserted by a dentist in wounds caused by the removal of the teeth from the mouth of the deceased, to stop hemorrhage, comes within the exception.¹⁵²

Sunstroke or heat prostration is not a bodily injury sustained through external, violent or accidental means, where liability from disease or bodily infirmity is excepted;¹⁵³ nor death from a germinal disease resulting from contact of the insured with putrid animal matter;¹⁵⁴ nor death from an over-dose of morphine, intentionally taken;¹⁵⁵ nor rupture caused by jumping from a car, where the act is voluntary;¹⁵⁶ nor death resulting from an epileptic fit.¹⁵⁷

Disease and Bodily Infirmity.

Death from a malignant pustule caused by contact with diseased animal matter, is death from disease.¹⁵⁸ Likewise death from sunstroke or heat prostration.¹⁵⁹ The words

¹⁵² *Kasten v. Interstate Casualty Co.*, 99 Wis. 73, 74 N. W. 534; *Early v. Standard Life & Acc. Ins. Co.*, 113 Mich. 58, 71 N. W. 500; *Westmoreland v. Preferred Acc. Ins. Co.*, 75 Fed. 244.

¹⁵³ *Dozier v. Fidelity & Casualty Co.*, 46 Fed. 446, 13 L. R. A. 114.

¹⁵⁴ *Bacon v. United States Mut. Acc. Ass'n*, 123 N. Y. 304.

¹⁵⁵ *Carnes v. Iowa State T. M. Ass'n*, 106 Iowa, 281, 76 N. W. 683.

¹⁵⁶ *Southard v. Railway Passengers' Assur. Co.*, 34 Conn. 574.

¹⁵⁷ *Tennant v. Travellers' Ins. Co.*, 31 Fed. 322. Compare *Larkin v. Interstate Casualty Co.*, 43 App. Div. 365, 60 N. Y. Supp. 205.

¹⁵⁸ *Bacon v. United States Mut. Acc. Ass'n*, 123 N. Y. 304.

¹⁵⁹ *Dozier v. Fidelity & Casualty Co.*, 46 Fed. 446.

"disease," or "bodily infirmity," as used in an accident policy exempting the insurer from injuries caused thereby, mean practically the same thing. They refer to an ailment, or disorder, or an unhealthy condition resulting from some functional disturbance, which tends to undermine the constitution.¹⁶⁰

Outward and Visible Means of Injury.

If the injury is visible soon after an accident, and is the result of the accident, it is not within the provision exempting the insurer from injuries "of which there is no visible, external mark upon the body of the insured;"¹⁶¹ as where there is a discoloration of the arm and shoulder.¹⁶²

Total Disability.

Total disability must, from the necessity of the case, be a relative matter, and must depend largely upon the occupa-

¹⁶⁰ *Cushman v. United States Life Ins. Co.*, 70 N. Y. 72; *North Western Mut. Life Ins. Co. v. Heimann*, 93 Ind. 24; *Pudritzky v. Supreme Lodge, K. of H.*, 76 Mich. 428, 43 N. W. 373; *Meyer v. Fidelity & Casualty Co.*, 96 Iowa, 378, 65 N. W. 328.

For definition of "sickness" and "good health," see *Barnes v. Fidelity Mut. Life Ass'n*, 191 Pa. St. 618, 43 Atl. 341; *Mutual Life Ins. Co. v. Simpson*, 88 Tex. 333, 28 L. R. A. 765; *White v. Provident Sav. Life Assur. Soc.*, 163 Mass. 108, 27 L. R. A. 398. See, also, c. 11, "Warranties and Representations."

¹⁶¹ *Pennington v. Pacific Mut. Life Ins. Co.*, 85 Iowa, 468, 52 N. W. 482, 45 Cent. Law J. 148, 39 Am. St. Rep. 306.

¹⁶² *Thayer v. Standard L. & A. Ins. Co.*, 68 N. H. 577, 41 Atl. 182. See, also, *National Ben. Ass'n v. Grauman*, 107 Ind. 288; *Railway Passenger Assur. Co. v. Burwell*, 4 Bigelow, L. & A. Rep. 49; *Stephens v. Railway Officials' & Employees' Acc. Ass'n*, 75 Miss. 84, 21 So. 710, 26 Ins. Law J. 540; *Bayless v. Travellers' Ins. Co.*, 14 Blatchf. 143, Fed. Cas. No. 1,138; *Rodey v. Travelers' Ins. Co.*, 3 N. M. 316, 9 Pac. 348; *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, 20 N. E. 347; *United States Mut. Acc. Ass'n v. Newman*, 84 Va. 52, 3 S. E. 805; *Eggenberger v. Guarantee Mut. Acc. Ass'n*, 41 Fed. 172.

tion and employment in which the party insured is engaged. One who labors with his hands might be so disabled by a severe injury to one hand as not to be able to labor at all at his usual occupation, whereas a merchant or professional man might, by the same injury, be only disabled from prosecuting some kinds of business pertaining to his occupation. Total disability does not mean absolute physical disability on the part of the insured to transact any kind of business pertaining to his occupation. Total disability exists although the insured is able to perform a few occasional acts, if he is unable to do any substantial portion of the work connected with his occupation. It is sufficient to prove that the injury wholly disabled him from the doing of all the substantial and material acts necessary to be done in the prosecution of his business, or that his injuries were of such a character and degree that common care and prudence required him to desist from his labors so long as was reasonably necessary to effect a speedy cure.¹⁶³ Insanity of the insured is a disability;¹⁶⁴ and blindness.¹⁶⁵

¹⁶³ *Young v. Travelers' Ins. Co.*, 80 Me. 244; *Bean v. Travelers' Ins. Co.*, 94 Cal. 581; *Ford v. United States Mut. Acc. Relief Co.*, 148 Mass. 153; *Turner v. Fidelity & Casualty Co.*, 112 Mich. 425, 38 L. R. A. 529; *Lobdill v. Laboring Men's Mut. Aid Ass'n*, 69 Minn. 14, 38 L. R. A. 537; *Hohn v. Inter-State Casualty Co.*, 115 Mich. 79, 72 N. W. 1105; *Ritter v. Preferred Masonic Mut. Acc. Ass'n*, 185 Pa. St. 90, 39 Atl. 1117; *Moge v. Societe De Bienfaisance St. Jean Baptiste*, 167 Mass. 298, 35 L. R. A. 736 (blindness). See, also, *McKinley v. Bankers' Acc. Ins. Co.*, 106 Iowa, 81, 75 N. W. 670, 27 Ins. Law J. 918; *Standard L. & A. Ins. Co. v. Ward*, 65 Ark. 295, 27 Ins. Law J. 719, 45 S. W. 1065; *Hart v. National Masonic Acc. Ass'n*, 105 Iowa, 717, 75 N. W. 508.

¹⁶⁴ *McCullough v. Expressman's Mut. Ben. Ass'n*, 133 Pa. St. 142, 7 L. R. A. 210.

¹⁶⁵ *Moge v. Societe De Bienfaisance St. Jean Baptiste*, 167 Mass. 298, 35 L. R. A. 736.

Inhaling Gas.

"Inhalation of gas" within the meaning of a policy exempting an insurer from liability, does not include the involuntary inhaling of a deadly gas in a well where its presence is unsuspected.¹⁶⁶ Death caused by unconsciously and unintentionally inhaling gas while asleep is within the terms of a policy insuring against injuries through external, violent, and accidental means, and is not within an exception of injuries resulting from poison or anything accidentally or otherwise taken, administered, absorbed or inhaled.¹⁶⁷ A provision exempting the insurer from liability for death or injury caused by inhalation of gas, contemplates a voluntary act of the assured.¹⁶⁸ Death resulting in part from suffocation, consequent upon the taking of chloroform, administered in a proper manner by a physician to relieve the insured from pain, is within a stipulation that there should be no liability for injury resulting from anything "accidentally or otherwise taken, or resulting, either directly or indirectly, wholly or in part from * * * medical or surgical treatment."¹⁶⁹

Poison.

Where a policy provides that its benefits shall not extend to any bodily injury happening directly or indirectly from the taking of poison, there can be no recovery where the

¹⁶⁶ *Pickett v. Pacific Mut. Life Ins. Co.*, 144 Pa. St. 79; *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472. But see *Richardson v. Travelers' Ins. Co.*, 46 Fed. 843.

¹⁶⁷ *Fidelity & Casualty Co. v. Lowenstein (E. C. A.)*, 97 Fed. 17, 46 L. R. A. 450; *Fidelity & Casualty Co. v. Waterman*, 161 Ill. 632, 44 N. E. 283. See, contra, *McGlother v. Provident Mut. Acc. Co.*, 60 U. S. App. 705, 89 Fed. 685; *Early v. Standard L. & A. Ins. Co.*, 113 Mich. 58, 71 N. W. 500.

¹⁶⁸ *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, 8 Am. St. Rep. 758.

¹⁶⁹ *Westmoreland v. Preferred Acc. Ins. Co.*, 75 Fed. 244.

insured died from the effects of poison, involuntarily taken by mistake.¹⁷⁰

Violation of Law.

An insurance company is not relieved from liability on a policy insuring against accidental death, except when caused by an injury received while violating the law, by the fact that when the injury was received the insured was violating the law, unless such violation had an actual connection with the injury, or contributed to it.¹⁷¹ Death caused from an accident received by an insured on a Sunday, some hours after he had stopped hunting, and some distance from the place where he was hunting, was not sustained while the insured was in violation of a law making it an offense to hunt on Sunday, and within the meaning of a stipulation exempting the insurer from liability if the accident or death re-

¹⁷⁰ Pollock v. United States Mut. Acc. Ass'n, 102 Pa. St. 230; Hill v. Hartford Acc. Ins. Co., 22 Hun (N. Y.), 187; Metropolitan Acc. Ass'n v. Froiland, 161 Ill. 30, 43 N. E. 766; Early v. Standard L. & A. Ins. Co., 113 Mich. 58, 71 N. W. 500, 26 Ins. Law J. 820; McGlother v. Provident Mut. Acc. Co. (C. C. A.), 89 Fed. 685. Compare Healey v. Mutual Acc. Ass'n, 133 Ill. 556, 9 L. R. A. 371; Bacon v. United States Mut. Acc. Ass'n, 44 Hun (N. Y.), 599. See, also, Cole v. Accident Ins. Co., 61 Law T. (N. S.) 227; Mutual Acc. Ass'n v. Tuggle, 39 Ill. App. 509; Paul v. Travelers' Ins. Co., 112 N. Y. 472; Menneiley v. Employers' Liability Assur. Corp., 148 N. Y. 596; Fidelity & Casualty Co. v. Waterman, 161 Ill. 632, 44 N. E. 283; Travelers' Ins. Co. v. Dunlap, 160 Ill. 642; Pickett v. Pacific Mut. Life Ins. Co., 144 Pa. St. 79.

¹⁷¹ Gross v. Miller, 93 Iowa, 72, 61 N. W. 385; Jones v. United States Mut. Acc. Ass'n, 92 Iowa, 652, 61 N. W. 485; Conboy v. Railway Officials' Employes' Acc. Ass'n (Ind. App.), 43 N. E. 1017.

Violation of criminal law: The killing of a person by the discharge of a gun which he was carrying, while at a place to which he had gone to get his wife to return home, and while he was coming out of an outdoor closet, into which he had gone after making some disturbance, does not constitute a case of death while violating or attempting to violate any criminal or penal law, although he may

sulted directly or indirectly from violation of law.¹⁷² But it has been held to the contrary.¹⁷³

A death ensuing in the commission of a misdemeanor, as where horse racing is a misdemeanor, is caused by violation of law.¹⁷⁴ The suicide of an alleged fugitive from justice to avoid arrest, is not a death in violation of a criminal law.¹⁷⁵ The death, by suicide, of an insured, will not avoid the policy, under a provision that it shall be void if the insured die in violation of, or in an attempt to violate, any criminal law, although the attempt to commit suicide is made a crime, if the statute does not cover the case of crime actually accomplished.¹⁷⁶ The death of a woman resulting from her voluntary submission to an operation intended to produce an abortion is a violation of criminal law;¹⁷⁷ and on grounds of public policy no recovery can be allowed.¹⁷⁸ And so if death come as the result of a duel;¹⁷⁹ or if the insured be killed while committing an unprovoked assault upon an-

have intended to use violence against her if she refused; since his act in going into and coming out of the closet was in no manner connected with or part of an attempt to carry out any criminal purpose. *Supreme Lodge, K. of P., v. Beck*, 181 U. S. 49, 21 Sup. Ct. 532.

¹⁷² *Prader v. National Masonic Acc. Ass'n*, 95 Iowa, 149, 63 N. W. 601.

¹⁷³ *Duran v. Standard L. & A. Ins. Co.*, 63 Vt. 437.

¹⁷⁴ *Travellers' Ins. Co. v. Seaver*, 19 Wall. (U. S.) 531. See, also, *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478; *Overton v. St. Louis Mut. Life Ins. Co.*, 39 Mo. 122, 90 Am. Dec. 455; *Utter v. Travelers' Ins. Co.*, 65 Mich. 545, 32 N. W. 812; *National Ben. Ass'n v. Bowman*, 110 Ind. 355, 11 N. E. 316; *Accident Ins. Co. of North America v. Bennett*, 90 Tenn. 256.

¹⁷⁵ *Kerr v. Minnesota Mut. Ben. Ass'n*, 39 Minn. 174.

¹⁷⁶ *Darrow v. Family Fund Soc.*, 116 N. Y. 537, 6 L. R. A. 495.

¹⁷⁷ *Wells v. New England Mut. Life Ins. Co.*, 191 Pa. St. 207, 43 Atl. 126.

¹⁷⁸ *Hatch v. Mutual Life Ins. Co.*, 120 Mass. 550; *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139.

¹⁷⁹ *Overton v. St. Louis Mut. Life Ins. Co.*, 39 Mo. 122.

other under such circumstances as rendered the killing justifiable homicide.¹⁸⁰

Intentional Injuries.

An exception in an accident insurance policy from liability for intentional injury inflicted by any person, will relieve the insurer from liability for an intentional assault committed by another upon the insured, without any expectation thereof by the assured;¹⁸¹ but not if the wound be inflicted by an insane person.¹⁸² Whether the injury or assault be intentional must be found from the surrounding facts and circumstances. The word *intentional*, in such a connection, is given its ordinary meaning. An injury was intentional where the insured, while in the yard near a window, through which he made an unsuccessful attempt to enter, was shot by another man who fired out of the window;¹⁸³ or where the assured is waylaid, and assassinated for purposes of robbery.¹⁸⁴

Walking on Roadbed.

A level beaten path of ten feet between railroad tracks is not part of the road bed within the terms of a policy barring recovery for injury or death while upon a railroad road bed.¹⁸⁵

¹⁸⁰ Wolff v. Connecticut Mut. Life Ins. Co., 5 Mo. App. 236. See, also, Murray v. New York Life Ins. Co., 96 N. Y. 614; Utter v. Travelers' Ins. Co., 65 Mich. 545, 32 N. W. 812; Griffin v. Western Mut. Benev. Ass'n, 20 Neb. 620; Bradley v. Mut. Ben. Life Ins. Co., 45 N. Y. 422; Bloom v. Franklin Life Ins. Co., 97 Ind. 478.

¹⁸¹ Travellers' Ins. Co. v. McConkey, 127 U. S. 661; Ging v. Travelers' Ins. Co., 74 Minn. 505, 77 N. W. 291; Butero v. Travelers' Acc. Ins. Co., 96 Wis. 536, 71 N. W. 811; Brown v. United States Casualty Co., 88 Fed. 38.

¹⁸² Berger v. Pacific Mut. Life Ins. Co., 88 Fed. 241.

¹⁸³ Orr v. Travelers' Ins. Co., 120 Ala. 647, 24 So. 997.

¹⁸⁴ Hutchcraft's Ex'r v. Travelers' Ins. Co., 87 Ky. 300, 12 Am. St. Rep. 484.

¹⁸⁵ Meadows v. Pacific Mut. Life Ins. Co., 129 Mo. 76, 31 S. W. 578.

Such a clause does not cover an injury received by a passenger through stepping off a railway train, and falling into or through a concealed hole.¹⁸⁶ Where a policy provides that it does not cover injuries resulting from walking or being on a road bed and further provides for a commutation of indemnity in case the insured be injured in an exposure or occupation classed by the company as more hazardous than that in which the insured was engaged, when the insured is injured while on a road bed he cannot take advantage of the latter clause unless he was within the class of employes excepted from the terms of the proviso.¹⁸⁷ Otherwise if he be classed as a railway employe.¹⁸⁸

Murder.

Murder is classed as an intentional injury, if committed by a sane person.¹⁸⁹ The killing of the insured, by an insane beneficiary, under such circumstances that it would be murder if the beneficiary was sane, does not forfeit the policy, nor bar a suit for recovery.¹⁹⁰ One cannot recover insurance money payable to him upon the death of a party whose life he has feloniously taken, any more than he could recover insurance money upon a building which he has wilfully burned. The law will not allow one to reap a benefit from his own criminal act.¹⁹¹ The murder of a person whose life is insured, by an assignee of the policy, whose claim to it is valid only for the reimbursement of premiums paid, forfeits only the assignee's

¹⁸⁶ *Burkhard v. Travellers' Ins. Co.*, 102 Pa. St. 262.

¹⁸⁷ *Yancey v. Aetna Life Ins. Co.*, 108 Ga. 349, 33 S. E. 979.

¹⁸⁸ *Keene v. New England Mut. Acc. Ass'n*, 164 Mass. 170.

¹⁸⁹ See ante, notes 181, 182.

¹⁹⁰ *Holdom v. A. O. U. W.*, 159 Ill. 619.

¹⁹¹ *New York Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 599; *Riggs v. Palmer*, 115 N. Y. 506. See, also, *Shellenberger v. Ransom*, 41 Neb. 631.

part of the insurance, and not the residue thereof.¹⁹² The murder of an insured by a beneficiary, forfeits the rights not only of the beneficiary, but of his assignee. But the insurer is not exempted from liability merely because the beneficiary's rights are thus forfeited. The policy may be enforced by the administrator of the assured, for the benefit of his estate, on the ground of a resulting trust created in favor of the estate by the forfeiture of the rights of the beneficiary named.¹⁹³

Intemperance.

The test between sobriety and inebriety is the effect produced by the use of liquors.¹⁹⁴ Under a policy conditioned to be void if the insured become so far intemperate as to seriously or permanently impair his health, no degree of intemperance will defeat recovery unless it clearly has that effect.¹⁹⁵

The term "intemperate" has reference to a customary or habitual use of liquors. Whether a person is habitually intemperate is a question of fact to be determined by a jury.¹⁹⁶ A condition forfeiting a policy if the assured shall become so far intemperate as to impair his health seriously or permanently, or induce delirium tremens, contemplates more than an occasional excessive indulgence. It refers to his customary conduct, to pursue which he has acquired a tendency from frequent repetition of the same acts.¹⁹⁷ A pro-

¹⁹² *New York Life Ins. Co. v. Davis*, 96 Va. 737, 32 S. E. 475, 44 L. R. A. 305.

¹⁹³ *Schmidt v. Northern Life Ass'n (Iowa)*, 83 N. W. 800, 51 L. R. A. 141.

¹⁹⁴ *McGinley v. United States Life Ins. Co.*, 77 N. Y. 495.

¹⁹⁵ *Odd Fellows Mut. Life Ins. Co. v. Rohkopp*, 94 Pa. St. 59.

¹⁹⁶ *Northwestern Life Ins. Co. v. Muskegon Bank*, 122 U. S. 501; *Van Valkenburgh v. American Popular Life Ins. Co.*, 70 N. Y. 605.

¹⁹⁷ *Davey v. Aetna Life Ins. Co.*, 20 Fed. 482; *Aetna Life Ins. Co. v. Deming*, 123 Ind. 384; *Union Mut. Life Ins. Co. v. Reif*, 36 Ohio St. 596.

vision that a policy shall be void if the death of the insured is caused by the use of intoxicating drink or opium, means that the things prohibited should be the direct cause of death.¹⁹⁸ An occasional use of liquors or opium, is not to be deemed intemperance. The indulgence must be excessive and habitual.¹⁹⁹

Death at the Hand of Justice.

Even if this risk were not excepted, or were specially covered, it would be against public policy to permit a recovery in such case.²⁰⁰

Accidents on Public or Private Conveyance, Trains, etc.

A policy conditioned that it should not cover injuries received while entering, trying to enter, or leaving a moving steam vehicle, does not insure against an accident received while attempting to get on a moving railway train.²⁰¹ An injury received by a traveler in the course of a journey, while walking between a steamboat and a railway station, is not caused or received "while traveling by public or private conveyance."²⁰² Injuries received "while actually riding upon a public conveyance in compliance with all the rules and reg-

¹⁹⁸ *Mutual Life Ins. Co. v. Stibbe*, 46 Md. 302.

¹⁹⁹ *Mowry v. Home Life Ins. Co.*, 9 R. I. 346; *Tatum v. State*, 63 Ala. 147. See, also, as to construction of provisions concerning intemperance, *Knickerbocker Life Ins. Co. v. Foley*, 105 U. S. 350; *Brockway v. Mutual Ben. Life Ins. Co.*, 9 Fed. 249; *Schultz v. Mutual Life Ins. Co.*, 6 Fed. 672; *Knecht v. Mutual Life Ins. Co.*, 90 Pa. St. 118; *Malicki v. Chicago Guaranty Fund Life Soc.*, 123 Mich. 148, 81 N. W. 1074; *Aetna Life Ins. Co. v. Davey*, 123 U. S. 739.

²⁰⁰ *Spruill v. North Carolina Mut. Life Ins. Co.*, 1 Jones (N. C.), 126; *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139.

²⁰¹ *Miller v. Travelers' Ins. Co.*, 39 Minn. 548.

²⁰² *Northup v. Railway Passenger Assur. Co.*, 2 Lans. 166, 43 N. Y. 516. See, also, *Ripley v. Railway Passengers' Assur. Co.*, 2 Bigelow, L. & A. Rep. 738; *Theobald v. Railway Passengers' Assur. Co.*, 10 Exch. 44, 2 Bigelow, L. & A. Rep. 393.

ulations of the carriers, and not neglecting to use due diligence for self-protection," do not include an injury to a passenger on a railway car by being thrown from its steps where he sat while the train was approaching the station, in violation of a known rule.²⁰³ One is a passenger while entering or alighting from a conveyance.²⁰⁴ Riding on the platform of a railway car is not necessarily voluntary exposure to unnecessary danger.²⁰⁵

The risk of getting on and off a moving train is incident to the business of a brakeman, and such as accident insurance obtained by him is intended to cover when his occupation is known to the insurer at the time of the making of the contract, and a provision in such a policy against accidents in attempting to enter or leave a moving conveyance cannot be insisted upon by the insurer.²⁰⁶

Suicide.

The rules covering the effect of suicide upon a life or accident insurance policy may be briefly stated thus:

(1) Intentional self-destruction is a complete defense where the insured or his estate is the beneficiary in the policy, even in the absence of any special provision to that effect.²⁰⁷ Otherwise if the money is payable to a designated beneficiary,²⁰⁸ and the policy was taken out in good faith.²⁰⁹ But

²⁰³ *Bon v. Railway Passenger Assur. Co.*, 56 Iowa, 664.

²⁰⁴ *King v. Travelers' Ins. Co.*, 101 Ga. 64, 28 S. E. 661.

²⁰⁵ *Travelers' Ins. Co. v. Randolph (C. C. A.)*, 78 Fed. 754.

²⁰⁶ *Dailey v. Preferred Masonic Mut. Acc. Ass'n*, 102 Mich. 289. See, also, *Cotten v. Fidelity & Casualty Co.*, 41 Fed. 506; *Anthony v. Mercantile Mut. Acc. Ass'n*, 162 Mass. 354, 38 N. E. 973; *Smith v. Preferred Mut. Acc. Ass'n*, 104 Mich. 634, 62 N. W. 990; *Travelers' Ins. Co. v. Snowden*, 45 Neb. 249.

²⁰⁷ *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139.

²⁰⁸ *Morris v. State Mut. Life Assur. Co.*, 183 Pa. St. 563, 39 Atl. 52.

²⁰⁹ *Seiler v. Economic Life Ass'n*, 105 Iowa, 87.

a secret intent of the insured, at the time he took out the policy, to commit suicide, would constitute fraud, which, if proven, would defeat recovery. Being void in its inception no rights would accrue under such a contract, to any person.²¹⁰

(2) A policy conditioned to be void in case the assured die by his own hand, is not avoided by self destruction in a fit of insanity.²¹¹

(3) No recovery can be had on a policy on the life of one who kills himself, whether sane or insane, where the policy stipulates that the insurer will not be liable in case the insured dies by suicide whether sane or insane.²¹²

One test of insanity is the capacity to understand the moral character of the taking of the life. Thus the intentional killing of himself by the insured, when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, is not suicide or self destruction, or dying by his own hands, within the meaning of such words in a clause excepting such risk, even though he understood the physical nature, consequences, and effect of his act.²¹³ The term "insanity," as used in this connection,

²¹⁰ *Parker v. Des Moines Life Ass'n*, 108 Iowa, 117, 78 N. W. 826; *Patterson v. Natural Premium Mut. Life Ins. Co.*, 100 Wis. 118, 75 N. W. 980.

²¹¹ *Eastabrook v. Union Mut. Life Ins. Co.*, 54 Me. 224; *Grand Lodge, I. O. M. A., v. Wieting*, 168 Ill. 408, 48 N. E. 59; *Van Zandt v. Mutual Ben. Life Ins. Co.*, 55 N. Y. 169, 14 Am. Rep. 215; *Connecticut Mut. Life Ins. Co. v. Groom*, 86 Pa. St. 92, 27 Am. Rep. 689; *John Hancock Mut. Life Ins. Co. v. Moore*, 34 Mich. 41; *Blackstone v. Standard Life & Acc. Ins. Co.*, 74 Mich. 592.

²¹² *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661; *Billings v. Accident Ins. Co.*, 64 Vt. 78, 17 L. R. A. 89; *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284; *Tritschler v. Keystone Mut. Ben. Ass'n*, 180 Pa. St. 205.

²¹³ *Connecticut Mut. Life Ins. Co. v. Akens*, 150 U. S. 468; *Mutual Life Ins. Co. v. Terry*, 15 Wall. (U. S.) 580; *Blackstone v. Standard*

means such a perverted and deranged condition of the mental and moral faculties, as to render the person incapable of distinguishing between right and wrong, or unconscious, at the time, of the nature of the act he is committing; or where, though conscious of it, and able to distinguish between right and wrong, and knowing that the act is wrong, yet his will, that is, the governing power of his mind, has been, otherwise than voluntarily, so completely destroyed that his actions are not subject to it, but are beyond his control.²¹⁴

Where the death may have been accidental or suicidal, the presumption is in favor of the former. What was really the cause of death is usually a question of fact for a jury. The burden of proof is on the insurer to prove, by a preponderance of evidence, that the deceased died through suicide;²¹⁵ but where the reasonable probabilities, from the evidence, all point to suicide as the cause of death, so as to establish it with such certainty as to leave no room for doubt, the question must be decided as one of law.²¹⁶

Voluntary Exposure to Unnecessary Danger.

The terms "voluntary exposure" and "unnecessary danger," and "hazardous adventure," within the meaning of an insurance policy, do not include such exposure as is incident to the ordinary habits and customs of life, but refer to something

Life & Acc. Ins. Co., 74 Mich. 592; Connecticut Mut. Life Ins. Co. v. Groom, 86 Pa. St. 96.

²¹⁴ Davis v. United States, 165 U. S. 373.

²¹⁵ Beckett v. Northwestern Masonic Aid Ass'n, 67 Minn. 298, 69 N. W. 923, and cases ante.

²¹⁶ Agen v. Metropolitan Life Ins. Co., 105 Wis. 217, 80 N. W. 1021; Travellers' Ins. Co. v. McConkey, 127 U. S. 661. In determining the question whether death was accidental or suicidal, the fact that deceased was an atheist or an infidel affords no presumption that he committed suicide. Gibson v. American Mut. Life Ins. Co., 37 N. Y. 580.

beyond the ordinary, such as wanton or gross carelessness. They import an exposure or risk by the assured to an unnecessary danger, with a consciousness thereof, and the intention or design to risk the consequences of the act. More than mere carelessness or negligence or inadvertence of the insured is meant.²¹⁷ The mere act of cleaning a gun, not known to be loaded, is not such exposure;²¹⁸ nor an attempt to drive a bull into a pasture;²¹⁹ nor an attempt to scale a bank with a loaded gun in hand;²²⁰ nor getting out upon the platform of a moving car;²²¹ nor is an attempt to board a slowly moving car necessarily.²²² But an attempt to pass through a trestle, known to be dangerous, upon a dark night, is voluntary exposure to unnecessary danger;²²³ and running along the tracks in front of a moving train;²²⁴ and jumping from a moving train;²²⁵ a condition requiring the insured to use due

²¹⁷ *Wilson v. Northwestern Mut. Acc. Ass'n*, 53 Minn. 470; *Manufacturers' Acc. Ind. Co. v. Dorgan (C. C. A.)*, 58 Fed. 945; *Keene v. New England Mut. Acc. Ass'n*, 164 Mass. 170; *Conboy v. Railway Officials' & Employes' Acc. Ass'n*, 17 Ind. App. 62, 46 N. E. 363.

²¹⁸ *Miller v. American Mut. Acc. Ins. Co.*, 92 Tenn. 167.

²¹⁹ *Johnson v. London Guarantee & Acc. Co.*, 115 Mich. 86, 40 L. R. A. 440.

²²⁰ *Cornwell v. Fraternal Acc. Ass'n*, 6 N. D. 201.

²²¹ *Marx v. Travelers' Ins. Co.*, 39 Fed. 321; *Burkhard v. Travellers' Ins. Co.*, 102 Pa. St. 262.

²²² *Johanns v. National Acc. Soc.*, 16 App. Div. 104, 45 N. Y. Supp. 117; *Fidelity & Casualty Co. v. Sittig*, 181 Ill. 111.

²²³ *Travelers' Ins. Co. v. Jones*, 80 Ga. 541; *Follis v. United States Mut. Acc. Ass'n*, 94 Iowa, 435, 28 L. R. A. 78.

²²⁴ *Tuttle v. Travellers' Ins. Co.*, 134 Mass. 175.

²²⁵ *Smith v. Preferred Mut. Acc. Ass'n*, 104 Mich. 634, 62 N. W. 990. See, also, on this question, *Standard Ins. Co. v. Langston*, 60 Ark. 381; *National Ben. Ass'n v. Jackson*, 114 Ill. 553; *Fidelity & Casualty Co. v. Chambers*, 93 Va. 138; *Scheiderer v. Travelers' Ins. Co.*, 58 Wis. 13; *United States Mut. Acc. Ass'n v. Hubbell*, 56 Ohio St. 516, 47 N. E. 544; *Lovelace v. Travelers' Protective Ass'n*, 126 Mo. 104, 30 L. R. A. 209; *Ashenfelter v. Employers' Liability Assur. Corp.*

care and diligence imposes upon him the duty to use such care and diligence as prudent persons ordinarily use.²²⁶ The term "voluntary over-exertion" means conscious or intentional over-exertion, or a reckless disregard of consequences likely to ensue from the effort.²²⁷

STIPULATIONS OF POLICY.

§ 151. Stipulations and conditions of an insurance contract restricting and limiting the liability of the insurer are (unless prohibited by statute) valid and must be recognized and enforced by the courts.

Title and Interest.

A stipulation in the policy that it shall be void if the insured is not the sole, absolute and unconditional owner of the property, does not refer to encumbrances upon the property, but to the character and quality of the title.²²⁸ It is reasonable, and will be enforced in the absence of waiver.²²⁹ It relates to subsequent changes in the title, rather than to the estate or condition when the policy is issued.²³⁰ Sole owners

(C. C. A.), 87 Fed. 682; *Matthes v. Imperial Acc. Ass'n*, 110 Iowa, 222, 81 N. W. 484; *Sawtelle v. Railway Passenger Assur. Co.*, 15 Blatchf. 216, Fed. Cas. No. 12,392; *Shevlin v. American Mut. Acc. Ass'n*, 94 Wis. 180, 36 L. R. A. 52; *Equitable Acc. Ins. Co. v. Osborn*, 90 Ala. 201, 13 L. R. A. 267.

²²⁶ *Kentucky L. & A. Ins. Co. v. Franklin*, 102 Ky. 512, 43 S. W. 709.

²²⁷ *Manufacturers' Acc. Ind. Co. v. Dorgan* (C. C. A.), 58 Fed. 952; *Rustin v. Standard L. & A. Ins. Co.*, 58 Neb. 792, 79 N. W. 712, 46 L. R. A. 253.

²²⁸ *Ellis v. Insurance Co. of North America*, 32 Fed. 646.

²²⁹ *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187, 37 S. W. 959; *East Texas Fire Ins. Co. v. Brown*, 82 Tex. 631.

²³⁰ *Hall v. Niagara Fire Ins. Co.*, 93 Mich. 184; *Hoose v. Prescott Ins. Co.*, 84 Mich. 309, 11 L. R. A. 340. Compare *National Fire Ins. Co. v. Orr*, 56 Ill. App. 627; *Collins v. London Assur. Corp.*, 165 Pa. St. 298; *Syndicate Ins. Co. v. Bohn* (C. C. A.), 65 Fed. 165; *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252. The statements in an application refer to the condition of the title at the time of making

of the capital stock of a corporation have not the sole and unconditional ownership of the property.²³¹ The owner of a life estate has not an absolute interest in the real estate.²³² The owner of an undivided interest in land is not the owner in fee simple.²³³ A devise of land with the reservation that the grantor shall have the right to re-enter on the happening of a condition subsequent does not convey absolute title.²³⁴ A policy conditioned to be void if the insured is not the sole and unconditional owner of the property insured, is avoided if the property belongs to a firm and is insured by one of the members of the firm in his own name without the insurer having knowledge of the facts.²³⁵ One holding an assignment of a land contract as collateral security for a loan, is not the sole and unconditional owner.²³⁶ The terms "interest" and "title" are not synonymous, and the mortgagor in possession, and a purchaser

the application. As to foreclosure of mortgage between making application and issuing policy, see *Day v. Hawkeye Ins. Co.*, 72 Iowa, 597, 34 N. W. 435. But in *Cable v. United States Life Ins. Co. (C. C. A.)*, 111 Fed. 19, it was held that a statement in an application for life insurance speaks as of the time of the delivery of the policy, and that an absolute duty rests upon the applicant to make disclosure to the insurer of any material changes in his condition covered by a statement in the application occurring after the statement was made and before the consummation of the contract.

²³¹ *Syndicate Ins. Co. v. Bohn (C. C. A.)*, 65 Fed. 165, 27 L. R. A. 614.

²³² *Davis v. Iowa State Ins. Co.*, 67 Iowa, 494.

²³³ *Scottish U. & N. Ins. Co. v. Petty*, 21 Fla. 399; *Garver v. Hawkeye Ins. Co.*, 69 Iowa, 202.

²³⁴ *Dowd v. American Ins. Co.*, 41 Hun (N. Y.), 139. As to effect of party wall on title, see *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571.

²³⁵ *McPetridge v. Phenix Ins. Co.*, 84 Wis. 200, 54 N. W. 326; *Germania Fire Ins. Co. v. Home Ins. Co.*, 4 Misc. Rep. 443, 24 N. Y. Supp. 357.

²³⁶ *Gettleman v. Commercial Union Assur. Co.*, 97 Wis. 237, 72 N. W. 627.

holding under a deed defectively executed, have both of them absolute as well as insurable interests in the property though neither has the legal title. "Absolute" is synonymous with "vested," and is used in contradistinction to "contingent," or "conditional."²³⁷ The vendor in an executory contract to sell, where the vendee is in possession, and has paid part of the purchase money, is not the sole and absolute owner;²³⁸ but such a vendee has been held to be.²³⁹ One who has purchased personal property under a contract that the title shall not vest until the terms of sale are complied with, is not, until fulfilment of his contract, the unconditional owner of the property.²⁴⁰ Owners in severalty may be absolute owners.²⁴¹ Proceedings to oust a tenant holding over without permission, is not a litigation that will defeat a policy providing that it shall be void if the title or possession be involved in litigation, when the proceedings to recover possession are predicated upon the provisions of the lease.²⁴² The stipulations of the policy must all be construed together. Thus it has been held that a provision that a policy shall be void unless the land on which the insured building stands is owned by the insured, is controlled by a description in the policy showing that the building was used in the business of

²³⁷ *Franklin Fire Ins. Co. v. Martin*, 40 N. J. Law, 568, 29 Am. Rep. 271; *Hough v. City Fire Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581.

²³⁸ *Hamilton v. Dwelling House Ins. Co.*, 98 Mich. 535.

²³⁹ *Knop v. National Fire Ins. Co.*, 101 Mich. 359; *Loventhal v. Home Ins. Co.*, 112 Ala. 108, 33 L. R. A. 258; *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. St. 460, 2 Am. St. Rep. 686; *Johannes v. Standard Fire Office*, 70 Wis. 196.

²⁴⁰ *Westchester Fire Ins. Co. v. Weaver*, 70 Md. 536, 5 L. R. A. 478.

²⁴¹ *Beebe v. Ohio Farmers' Ins. Co.*, 93 Mich. 514, 18 L. R. A. 481. As to estate by entirety, see *Clawson v. Citizens' Mut. Fire Ins. Co.*, 121 Mich. 591, 80 N. W. 573.

²⁴² *Hall v. Niagara Fire Ins. Co.*, 93 Mich. 184.

a post-trader, and was situate on land belonging to the United States.²⁴³

Change of Title and Possession.

A condition of a policy of insurance that if any change in the title or possession of the property takes place, whether by sale, transfer, conveyance, legal process or judicial decree, then and in every such case the policy shall be void, includes an involuntary as well as a voluntary change of possession. A writ of attachment is process, and the fact that an officer levied upon property insured under a writ of attachment, and took possession thereunder, shows a change of possession avoiding the policy.²⁴⁴ The making of a mortgage is not a change of possession;²⁴⁵ nor a change of receivers;²⁴⁶ nor leaving the premises temporarily in charge of an agent.²⁴⁷

Alienation or Change of Title or Interest

In some cases it has been held that an inhibition against a change of title, interest or possession would invalidate a policy, although a clause prohibiting a sale or alienation might not have that effect.²⁴⁸ The making of a contract for

²⁴³ *Broadwater v. Lion Fire Ins. Co.*, 34 Minn. 465. See, also, as to title, *Southwick v. Atlantic F. & M. Ins. Co.*, 133 Mass. 457 (quit-claim deed from second mortgagee does not convey full title); *Franklin Fire Ins. Co. v. Vaughan*, 92 U. S. 516; *Chandler v. St. Paul F. & M. Ins. Co.*, 21 Minn. 85 (when title to personal property passes).

²⁴⁴ *Carey v. German American Ins. Co.*, 84 Wis. 80, 20 L. R. A. 267. See, also, ante, "Alienation."

²⁴⁵ *Nussbaum v. Northern Ins. Co.*, 37 Fed. 524.

²⁴⁶ *Thompson v. Phenix Ins. Co.*, 136 U. S. 287.

²⁴⁷ *Shearman v. Niagara Fire Ins. Co.*, 46 N. Y. 526.

²⁴⁸ *Hathaway v. State Ins. Co.*, 64 Iowa, 229; *Gibb v. Philadelphia Fire Ins. Co.*, 59 Minn. 267, 61 N. W. 137; *Phenix Ins. Co. v. Holcombe*, 57 Neb. 622, 78 N. W. 301. But see *Burnett v. Eufaula Home Ins. Co.*, 46 Ala. 11; *New Orleans Ins. Ass'n v. Holberg*, 64 Miss. 51, 8 So. 175.

the sale of property insured, without the consent of the insurer, comes within a provision that the policy shall be void upon a sale without the insurer's consent, and the policy is not restored upon abandonment of the contract.²⁴⁹ An unconditional transfer operates as a forfeiture;²⁵⁰ and a transfer of the equitable title, if the policy provides that it shall be void if any change takes place in the title, if, under the law of the state where the property is situated, the beneficial interest passes with the equitable title.²⁵¹ The giving of a chattel mortgage by one partner on firm property, for his individual benefit, is a change of interest, title or possession;²⁵² and the formation of a co-partnership;²⁵³ and a partition of property among the devisees of the insured;²⁵⁴ and a conveyance by the assured and his wife to another, who reconveys to the wife;²⁵⁵ and a conveyance by the insured to her husband's trustee in insolvency;²⁵⁶ and an executory agreement to convey the insured premises, where the vendee takes possession and pays part of the purchase price.²⁵⁷

The execution of a deed, absolute in form, though intended and given as security for a debt, is within a provision that a policy shall be void "if the property be sold or transferred,

²⁴⁹ *Davidson v. Hawkeye Ins. Co.*, 71 Iowa, 532, 32 N. W. 514; *California State Bank v. Hamburg-Bremen Ins. Co.*, 71 Cal. 11.

²⁵⁰ *Griffey v. New York Cent. Ins. Co.*, 100 N. Y. 417.

²⁵¹ *Cottingham v. Firemen's Fund Ins. Co.*, 90 Ky. 439, 9 L. R. A. 627.

²⁵² *Olney v. German Ins. Co.*, 88 Mich. 94, 13 L. R. A. 684.

²⁵³ *Germania Fire Ins. Co. v. Home Ins. Co.*, 4 Misc. Rep. 443, 24 N. Y. Supp. 357.

²⁵⁴ *Trabue v. Dwelling House Ins. Co.*, 121 Mo. 75, 23 L. R. A. 719.

²⁵⁵ *Langdon v. Minnesota Farmers' Mut. Fire Ins. Ass'n*, 22 Minn. 193; *Oakes v. Manufacturers' F. & M. Ins. Co.*, 131 Mass. 164.

²⁵⁶ *Brown v. Cotton & W. M. Mut. Ins. Co.*, 156 Mass. 587.

²⁵⁷ *Gibb v. Philadelphia Fire Ins. Co.*, 59 Minn. 267, 61 N. W. 137.

or any change take place in the title or possession, etc.”;²⁵⁸ and the making of a void, fraudulent, or imperfect deed.²⁵⁹

Whether or not an accepted offer to purchase insured property constitutes a breach of condition in the policy against a change of ownership is a question for the court. The acceptance of a proposition to buy real property, which is definite in nothing more than the amount to be paid, does not prevent an interest in the insured of the “entire, unconditional, unencumbered, and sole ownership.”²⁶⁰ A sale or transfer means a transfer of the entire interest of the assured. The taking in of a partner has been held not to be a sale or transfer within the meaning of the condition of the policy;²⁶¹ nor the sale from one partner to another;²⁶²

The word “alienation” imports an actual transfer of title;²⁶³ and of all the title of the insured.²⁶⁴ A void deed

²⁵⁸ *Barry v. Hamburg-Bremen Fire Ins. Co.*, 21 Jones & Sp. (N. Y.) 249; *Dailey v. Westchester Fire Ins. Co.*, 131 Mass. 173.

²⁵⁹ *Baldwin v. Phoenix Ins. Co.*, 60 N. H. 164. See, also, *Foote v. Hartford Fire Ins. Co.*, 119 Mass. 259; *Mulville v. Adams*, 19 Fed. 887; *Moulthrop v. Farmers' Mut. Fire Ins. Co.*, 52 Vt. 123; *Farmers' Ins. Co. v. Archer*, 36 Ohio St. 608; *Buchanan v. Westchester County Mut. Ins. Co.*, 61 N. Y. 611.

²⁶⁰ *Arkansas Fire Ins. Co. v. Wilson*, 67 Ark. 553, 48 L. R. A. 510. As to effect of executory agreement to sell, see, also, *Erb v. German-American Ins. Co.*, 98 Iowa, 606; *Forward v. Continental Ins. Co.*, 142 N. Y. 382.

²⁶¹ *Blackwell v. Miami Valley Ins. Co.*, 48 Ohio St. 553, 14 L. R. A. 431. But see, contra, *Germania Fire Ins. Co. v. Home Ins. Co.*, 144 N. Y. 195; ante, notes 252, 253.

²⁶² *Allemania Fire Ins. Co. v. Peck*, 133 Ill. 220; *Roby v. American Cent. Ins. Co.*, 120 N. Y. 510; *New Orleans Ins. Ass'n v. Holberg*, 64 Miss. 51; *Dresser v. United Firemen's Ins. Co.*, 45 Hun (N. Y.), 298. See, also, as to dealings between partners, *West v. Citizens' Ins. Co.*, 27 Ohio St. 1; *Cowan v. Iowa State Ins. Co.*, 40 Iowa, 551; *Powers v. Guardian F. & L. Ins. Co.*, 136 Mass. 108.

²⁶³ *Marts v. Cumberland Mut. Fire Ins. Co.*, 44 N. J. Law, 478.

²⁶⁴ *Cowan v. Iowa State Ins. Co.*, 40 Iowa, 551. See *Commercial Ins. Co. v. Scammon*, 123 Ill. 601.

does not effect a change of title.²⁶⁵ An agreement to sell property is not an alienation.²⁶⁶ A stipulation that a policy shall be void upon the entering of a decree of foreclosure, refers to a decree of strict foreclosure. A void execution sale is not a "sale or levy under execution."²⁶⁷

A change of title by the natural death of the insured, is not a change contemplated by the policy, where the insurer agrees "to make good to the assured, his executors, etc.," all loss.²⁶⁸ But it has been held otherwise.²⁶⁹

The assignment by a debtor of his property for the benefit of his creditors operates as an assignment of, and renders void a fire insurance policy held by him which contains a provision that it shall be void if assigned without the assent of the company.²⁷⁰

²⁶⁵ *German Ins. Co. v. York*, 48 Kan. 488; *Phoenix Ins. Co. v. Asbury*, 102 Ga. 565, 27 S. E. 667; *Forward v. Continental Ins. Co.*, 142 N. Y. 382; *Gilbert v. North American Fire Ins. Co.*, 23 Wend. (N. Y.) 43.

²⁶⁶ *Parcell v. Grosser*, 109 Pa. St. 617.

²⁶⁷ *Pearman v. Gould*, 42 N. J. Eq. 4. See, also, as to effect of giving mortgage: *Friezen v. Allemania Fire Ins. Co.*, 30 Fed. 352; *Bryan v. Traders' Ins. Co.*, 145 Mass. 389; *Walradt v. Phoenix Ins. Co.*, 136 N. Y. 375; *Koshland v. Fire Ass'n*, 31 Or. 362, 49 Pac. 866; deed which is in effect a mortgage: *Barry v. Hamburg-Bremen Fire Ins. Co.*, 110 N. Y. 1; *Commercial Ins. Co. v. Scammon*, 123 Ill. 601; *New Orleans Ins. Co. v. Gordon*, 68 Tex. 144; imperfect or illegal sale under mortgage: *Niagara Fire Ins. Co. v. Scammon*, 144 Ill. 490; *Marts v. Cumberland Mut. Fire Ins. Co.*, 44 N. J. Law, 478; *Haight v. Continental Ins. Co.*, 92 N. Y. 51; execution sale: *Hammel v. Queen's Ins. Co.*, 54 Wis. 72; *Hopkins Manufacturing Co. v. Aurora F. & M. Ins. Co.*, 48 Mich. 148; *Loy v. Home Ins. Co.*, 24 Minn. 315; conveyance of tax title interest: *Kyte v. Commercial Union Assur. Co.*, 144 Mass. 46; lease for term of years: *Smith v. Phoenix Ins. Co.*, 91 Cal. 323, 13 L. R. A. 475.

²⁶⁸ *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39, 55 N. E. 139; *Westchester Fire Ins. Co. v. Dodge*, 44 Mich. 420; *Richardson's Adm'r v. German Ins. Co.*, 89 Ky. 571, 8 L. R. A. 800.

²⁶⁹ *Germania Fire Ins. Co. v. Home Ins. Co.*, 144 N. Y. 195.

²⁷⁰ *Dubé v. Masconia Mut. Fire Ins. Co.*, 64 N. H. 527, 1 L. R. A. 57;

Alterations and Repairs.

It is competent for the insurer and insured to agree that this or that alteration or change shall work a forfeiture, in which case the only inquiry will be whether the one in question comes within the agreement. The violation of a condition of the policy that it shall be void and of no effect if "mechanics are employed in building, altering or repairing the premises" without notice to or permission of the insurer, terminates the contract in the absence of the waiver, and it is immaterial whether or not the alteration and repairs increase the risk.²⁷¹

In construing clauses of a policy prohibiting changes in the situation or circumstances affecting the risk, there is an implied exception as to ordinary repairs, made in a reasonable and proper way.²⁷² A clause prohibiting alterations, additions or enlargement of insured buildings, without notice to and consent of an insurer, but allowing ordinary and necessary repairs, does not authorize the insured to make a material enlargement of the premises, without the consent of the insurer, although the risk be in no manner increased.²⁷³ Such conditions are not to be extended by implication so as to include cases not clearly or reasonably within the words

Perry v. Lorillard Fire Ins. Co., 61 N. Y. 214. See, also, *Thompson v. Phenix Ins. Co.*, 136 U. S. 287; *Trabue v. Dwelling House Ins. Co.*, 121 Mo. 75, 23 L. R. A. 719; *Georgia Home Ins. Co. v. Kinnier's Adm'x*, 28 Grat. (Va.) 88; *Brown v. Cotton & W. M. Mut. Ins. Co.*, 156 Mass. 587; *Roby v. American Cent. Ins. Co.*, 120 N. Y. 510; *Keeney v. Home Ins. Co.*, 71 N. Y. 396; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389; *Carey v. German American Ins. Co.*, 84 Wis. 80; *Orr v. Citizens' Fire Ins. Co.*, 159 Ill. 187, 43 N. E. 867.

²⁷¹ *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452.

²⁷² *First Congregational Church v. Holyoke Mut. Fire Ins. Co.*, 158 Mass. 475, 35 Am. St. Rep. 508.

²⁷³ *Frost's Detroit L. & W. W. Works v. Millers' & M. Mut. Ins. Co.*, 37 Minn. 300.

as ordinarily used and understood, and do not include the making of ordinary and necessary repairs to the building to preserve it from decay, or the cutting of a stove pipe hole in a partition, or other similar acts which are reasonably necessary and do not add to the risk, and are not directly or indirectly the cause of the fire.²⁷⁴

In *Mack v. Rochester German Ins. Co.*,²⁷⁵ the policy provided that the working of mechanics in the building altering or repairing it without the consent of the company endorsed thereon, would cause the forfeiture of all claims under the policy. Mechanics were at work making changes in the building at the time of the fire, without the consent of the insurer, and it was held that this avoided the policy. The court approved the rule last laid down, and said: "Certain conditions are very generally regarded by underwriters as largely increasing the hazards of insurance, and they, unless corresponding premiums are paid for the extra risks, are usually intended to be excluded from the obligation of the policy. Such are the conditions in reference to unoccupied houses, changes in the occupation from one kind of business to another more hazardous, the use of inflammable substances in buildings, and their occupation by carpenters, roofers, etc., for the purpose of making changes and alterations. These conditions, when plainly expressed in a policy, are binding upon the parties, and should be enforced by courts if the evidence brings the case clearly within their meaning and intent."

Permission to make alterations and repairs to the insured property, incidental to the business for which it is used, means only that such may be made in relation to carrying on the business of the insured, as would not essentially and ma-

²⁷⁴ *James v. Lycoming Ins. Co.*, 4 Cliff. 272, Fed. Cas. No. 7,182.

²⁷⁵ 106 N. Y. 560, 13 N. E. 343; *Lyman v. State Mut. Fire Ins. Co.*, 14 Allen (Mass.), 329.

terially increase the danger of the property being destroyed by fire;²⁷⁶ and does not authorize the erection of a building forty feet distant from that insured, although connected with the main building by a bridge and an underground passage for pipes.²⁷⁷ Necessary repairs, made in good faith, during the time within which the insurer may exercise the option to rebuild or repair the premises, do not defeat a right to recovery.²⁷⁸ Repairs made without the knowledge or consent of the assured cannot affect his rights.²⁷⁹ If there be no prohibition against alteration or repairs, an alteration will only avoid the policy when it increases the risk.²⁸⁰

Other Insurance.

The breach of a condition of a policy against other insurance is available as a defense to an action on the policy although the additional insurance had ceased to be in force when the loss occurred;²⁸¹ and though the second policy contains a like condition.²⁸² A policy of insurance, conditioned to be void if other or prior insurance be or exist on the property, is voided by a prior and existing policy in favor of one of the joint owners of the property;²⁸³ and will not be reinstated by the expiration of the earlier policy before the loss.²⁸⁴ A provision that a policy shall be void in case of

²⁷⁶ *Crane v. City Ins. Co.*, 3 Fed. 558.

²⁷⁷ *Peoria Sugar Refining Co. v. People's Fire Ins. Co.*, 24 Fed. 773.

²⁷⁸ *Eliot Five Cents Sav. Bank v. Commercial Assur. Co.*, 142 Mass. 142, 7 N. E. 550.

²⁷⁹ *Breckinridge v. American Cent. Ins. Co.*, 87 Mo. 62.

²⁸⁰ *Stetson v. Massachusetts Mut. Fire Ins. Co.*, 4 Mass. 330, 3 Am. Dec. 217; *Washington Fire Ins. Co. v. Davison*, 30 Md. 92; *Rann v. Home Ins. Co.*, 59 N. Y. 387; *Dorn v. Germania Ins. Co. (Ohio)*, 5 Ins. Law J. 183.

²⁸¹ *Replogle v. American Ins. Co.*, 132 Ind. 360.

²⁸² *Reed v. Equitable F. & M. Ins. Co.*, 17 R. I. 785, 18 L. R. A. 496.

²⁸³ *Horridge v. Dwelling-House Ins. Co.*, 75 Iowa, 374, 39 N. W. 648.

²⁸⁴ *Georgia Home Ins. Co. v. Rosenfield (C. C. A.)*, 95 Fed. 358.

other insurance, without notice and consent of the insurer, is *ipso facto* avoided by the taking out of additional insurance, without the consent of the insurer, or its waiver of the provision.²⁸⁵

Notice to the insurance company at the time of the issuance of the policy that there is prior insurance will estop it from asserting that the policy is void under a condition against other insurance. The tendency and weight of modern authority is in favor of the rule that the condition is not waived by the issuance of the policy, after notice only to a mere soliciting agent of the existence of additional insurance. Much would seem to depend upon the relation of the agent to the company, and the stipulations of the policy itself.²⁸⁶

A condition against other insurance is violated by the existence of a prior policy, which, although void, appears valid upon its face;²⁸⁷ and cannot be defeated by saying that the prohibited insurance is invalid because of the existence of a like condition in the second policy.²⁸⁸ A policy which is in and of itself void so that in fact it constitutes no contract of

²⁸⁵ Johnson v. American Ins. Co., 41 Minn. 396.

²⁸⁶ German Ins. Co. v. Gray, 43 Kan. 497, 8 L. R. A. 70, 19 Am. St. Rep. 150; American Ins. Co. v. Gallatin, 48 Wis. 36; Reed v. Equitable F. & M. Ins. Co., 17 R. I. 785; Berry v. American Cent. Ins. Co., 132 N. Y. 49; Minnock v. Eureka F. & M. Ins. Co., 90 Mich. 236. But see Key v. Des Moines Ins. Co., 77 Iowa, 174; Kister v. Lebanon Mut. Ins. Co., 128 Pa. St. 553, 5 L. R. A. 646; Farnum v. Phoenix Ins. Co., 83 Cal. 246; Eames v. Home Ins. Co., 94 U. S. 621; Russell v. Detroit Mut. Fire Ins. Co., 80 Mich. 407.

²⁸⁷ Phoenix Ins. Co. v. Copeland, 90 Ala. 386; London & L. Fire Ins. Co. v. Turnbull, 86 Ky. 230; Saville v. Aetna Ins. Co., 8 Mont. 419; Funke v. Minnesota Farmers' Mut. Fire Ins. Ass'n, 29 Minn. 347, 43 Am. Rep. 216; Carpenter v. Providence Wash. Ins. Co., 16 Pet. (U. S.) 495.

²⁸⁸ Stevenson v. Phoenix Ins. Co., 83 Ky. 7; Phenix Ins. Co. v. Lamar, 106 Ind. 513. But see Germania Fire Ins. Co. v. Klewer, 129 Ill. 599 (holding also that the existence of other insurance only suspends the policy); Hubbard v. Hartford Fire Ins. Co., 33 Iowa, 325.

insurance does not breach the condition.²⁸⁹ Insurance taken out by the mortgagee for himself, without the mortgagor's knowledge or consent, or *vice versa*, is not within the condition;²⁹⁰ nor insurance procured by a third party without the knowledge or consent of the insured.²⁹¹ Where the owner of insured property has insurance in two companies, and there is a question as to his right to recover from either, the assertion of a claim against each is not a fraud, or attempt at fraud.²⁹²

Incumbrances.

A mortgage is an encumbrance upon property, but it is not a sale or alienation.²⁹³ No recovery can be had upon a policy containing a stipulation that it shall be void if the property is or shall be encumbered by mortgage, when the property was at the time covered by a mortgage, unless the company has waived, or is estopped to rely upon the stipulation, even though no inquiry be made when the policy was issued.²⁹⁴ The stip-

²⁸⁹ Reed v. Equitable F. & M. Ins. Co., 17 R. I. 785; American Ins. Co. v. Replogle, 114 Ind. 1, 15 N. E. 810.

²⁹⁰ Cannon v. Home Ins. Co., 49 La. Ann. 1367; Guest v. New Hampshire Fire Ins. Co., 66 Mich. 98, 33 N. W. 31; Hardy v. Lancashire Ins. Co., 166 Mass. 210, 44 N. E. 209.

²⁹¹ Niagara Fire Ins. Co. v. Scammon, 144 Ill. 490; but see Gillett v. Liverpool & L. & G. Ins. Co., 73 Wis. 203.

²⁹² Bennett v. Council Bluffs Ins. Co., 70 Iowa, 600. As to notice and waiver of condition against other insurance, see Johnson v. American Ins. Co., 41 Minn. 396; Fairfield Packing Co. v. Southern Mut. Fire Ins. Co. (Pa.), 44 Atl. 317; Robinson v. Fire Ass'n of Philadelphia, 63 Mich. 90; Miller v. Hartford Fire Ins. Co., 70 Iowa, 764; Day v. Mechanics' & Traders' Ins. Co., 88 Mo. 325; New Orleans Ins. Ass'n v. Griffin, 66 Tex. 232; Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. Fire Ins. Co., 110 Iowa, 423, 81 N. W. 707.

²⁹³ Friezen v. Allemania Fire Ins. Co., 30 Fed. 349.

²⁹⁴ Thorne v. Aetna Ins. Co., 102 Wis. 593, 78 N. W. 920; Harding v. Norwich Union Fire Ins. Soc., 10 S. D. 64, 71 N. W. 755; Fitchburg Sav. Bank v. Amazon Ins. Co., 125 Mass. 431; Crikelair v. Citizens' Ins. Co., 168 Ill. 309.

ulation is effective where one of the insured firm executes a mortgage upon his interest in the insured property.²⁹⁵ The term "mortgage" includes an instrument securing the performance of a contract for support and maintenance.²⁹⁶ Permission to sell chattels does not include permission to mortgage them.²⁹⁷

The cancellation of old mortgages, and the substitution of new ones by way of renewals, is not the creation of a new encumbrance, but simply changing the form of the old.²⁹⁸ And it has been held that the effect of additional encumbrances on the property insured is not a breach of condition against encumbrances, where the total amount of valid encumbrances at no time exceeds the amount mentioned by the assured in his application; and it seems to be immaterial what the character of the encumbrances is, or to whom they are due.²⁹⁹

The term "property" as used in the phrase "if the property insured shall hereafter become mortgaged or encumbered" refers to all the property insured. And if the insured property be both real and personal, the mortgaging of a part of it will not work a forfeiture of the entire policy.³⁰⁰ A judgment is not an encumbrance.³⁰¹ A clause in a lease, reserving to

²⁹⁵ *Hicks v. Farmers' Ins. Co.*, 71 Iowa, 119, 32 N. W. 201.

²⁹⁶ *Continental Ins. Co. v. Vanlue*, 126 Ind. 410. See, also, *Williamson v. Orient Ins. Co.*, 100 Ga. 791, 28 S. E. 914.

²⁹⁷ *First Nat. Bank v. American Cent. Ins. Co.*, 58 Minn. 492, 60 N. W. 345.

²⁹⁸ *Burns v. Thayer*, 101 Mass. 426; *Bowlus v. Phenix Ins. Co.*, 133 Ind. 106.

²⁹⁹ *Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 553, 5 L. R. A. 646; *Mowry v. Agricultural Ins. Co.*, 64 Hun (N. Y.), 137. But see *Hankins v. Rockford Ins. Co.*, 70 Wis. 1, 35 N. W. 34; *Russell v. Cedar Rapids Ins. Co.*, 71 Iowa, 69, 32 N. W. 95.

³⁰⁰ *Born v. Home Ins. Co.*, 110 Iowa, 379, 81 N. W. 677.

³⁰¹ *Pickel v. Phenix Ins. Co.*, 119 Ind. 291, 18 Ins. Law J. 598. See, also, *Phenix Ins. Co. v. Swann* (Tex.), 41 S. W. 519.

the lessor a first lien upon all buildings for unpaid rental or taxes, does not amount to, or create a chattel mortgage upon a building situate upon the leased ground, within the meaning of a stipulation in a policy avoiding it if the building be or become encumbered by a chattel mortgage.³⁰²

Vacancy and Occupancy.

In construing a condition of an insurance policy against vacancy and non-occupancy, the courts will look to the subject matter of the contract, and the ordinary incidents attending the use of the insured property.³⁰³ The occupancy of a dwelling,³⁰⁴ of a mill,³⁰⁵ of a barn,³⁰⁶ of a building used for manufacturing purposes,³⁰⁷ is each essentially different in its scope and character. The object of the stipulation against vacancy and non-occupancy is to guard against the increased risk arising from the absence of everybody whose duty or

³⁰² *Caplis v. American Fire Ins. Co.*, 60 Minn. 376.

³⁰³ *Whitney v. Black River Ins. Co.*, 72 N. Y. 117; *American Fire Ins. Co. v. Brighton Cotton Mfg. Co.*, 125 Ill. 131.

"What constitutes vacancy or nonoccupancy of a building is a question of law; but whether a building is vacant or unoccupied or not, within the meaning of the law, is a question of fact for the jury. To constitute occupancy of a dwelling house, it is not essential that it be continuously used by a family; the family may be absent from it for health, pleasure, business or convenience for reasonable periods, and the house will not on that account be considered as vacant or unoccupied. * * * It is not essential that the building should be put to all the uses ordinarily made of a dwelling, or to some of those uses all of the time, nor that the whole house should be subjected to that use." *Moody v. Amazon Ins. Co.*, 52 Ohio St. 12, 26 L. R. A. 313.

³⁰⁴ *Continental Ins. Co. v. Kyle*, 124 Ind. 132.

³⁰⁵ *Frost's Detroit L. & W. W. Works v. Millers' & M. Mut. Ins. Co.*, 37 Minn. 300.

³⁰⁶ *Sonneborn v. Manufacturers' Ins. Co.*, 44 N. J. Law, 220; *Kimball v. Monarch Ins. Co.*, 70 Iowa, 513.

³⁰⁷ *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165; *Brighton Mfg. Co. v. Reading Fire Ins. Co.*, 33 Fed. 232.

interest might afford protection from fire.³⁰⁸ A fair and reasonable construction of the term "vacant and unoccupied," as applied to a house, is that it shall be without an occupant, without any person living in it.³⁰⁹ Speaking of a dwelling house and barn the supreme court of Massachusetts said: "Occupancy, as applied to such buildings, implies an actual use of the house as a dwelling place, and such use of the barn as is ordinarily incident to a barn belonging to an occupied house, or at least something more than a use of it for mere storage. The insurer has a right, by the terms of the policy, to the care and supervision which is involved in such occupancy."³¹⁰

A dwelling house in which no one lives, and in which a former occupant has left some furniture of small value, is vacant and unoccupied;³¹¹ and a house from which the owner or tenant has removed with no definite intention of returning.³¹² But a temporary absence, or the occasional and necessary absence of the family and servants, will not be so construed.³¹³ A building is not "vacant, unoccupied, or not in use" if being repaired and refitted, and some one sleeps in

³⁰⁸ *Sleeper v. New Hampshire Fire Ins. Co.*, 56 N. H. 401.

³⁰⁹ *Moore v. Phoenix Fire Ins. Co.*, 64 N. H. 140, 10 Am. St. Rep. 384; *Herrman v. Adriatic Fire Ins. Co.*, 85 N. Y. 163.

³¹⁰ *Ashworth v. Builders' Mut. Fire Ins. Co.*, 112 Mass. 422.

³¹¹ *Sexton v. Hawkeye Ins. Co.*, 69 Iowa, 99.

³¹² *Sleeper v. New Hampshire Fire Ins. Co.*, 56 N. H. 401. See, also, *Bennett v. Agricultural Ins. Co.*, 50 Conn. 420; *Moore v. Phoenix Fire Ins. Co.*, 64 N. H. 140, 10 Am. St. Rep. 384; *Continental Ins. Co. v. Kyle*, 124 Ind. 132, 9 L. R. A. 81; *Doud v. Citizens' Ins. Co.*, 141 Pa. St. 47; *Burlington Ins. Co. v. Brockway*, 138 Ill. 644; *Limburg v. German Fire Ins. Co.*, 90 Iowa, 709, 23 L. R. A. 99; *American Ins. Co. v. Padfield*, 78 Ill. 167.

³¹³ *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; *Laselle v. Hoboken Fire Ins. Co.*, 43 N. J. Law, 468; *Home Ins. Co. v. Wood*, 47 Kan. 521.

it;³¹⁴ or if a tenant has moved some of his furniture in, with the intention of using the house as a dwelling.³¹⁵

A building used as a morocco factory, which was unused for about six months prior to the fire, was held to be unoccupied, even though all the machinery remained in the building, and it was closed and locked, and in the hands of an agent to rent.³¹⁶ Otherwise, if it was only temporarily closed for repairs, and night and day watchmen were on duty, and employes at and about it.³¹⁷ An agreement that the insured may leave his house unoccupied during the summer of each year, inserted in his original policy, covers all renewals of the policy.³¹⁸ After a fire, and during the time within which the insurer can decide whether it will rebuild, a vacancy clause is suspended.³¹⁹

Both conditions need not be shown, in order to avoid a policy of insurance under a clause making it void when vacant or unoccupied.³²⁰ The fact that the owner of a house, who lived alone in it, left it for two months, does not, as a matter of law, make it vacant or unoccupied, within the condition avoiding the policy should the premises become vacant or unoccupied and so remain for ten days, if the absence was not intended to be permanent, and if the house was visited daily by a neighbor with whom the keys had been left.³²¹ A pro-

³¹⁴ *Stensgaard v. National Fire Ins. Co.*, 36 Minn. 181.

³¹⁵ *Doud v. Citizens' Ins. Co.*, 141 Pa. St. 47; *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472; *Traders' Ins. Co. v. Race*, 142 Ill. 338, 29 N. E. 846, 31 N. E. 392.

³¹⁶ *Halpin v. Insurance Co. of North America*, 120 N. Y. 73, 8 L. R. A. 79.

³¹⁷ *Brighton Mfg. Co. v. Reading Fire Ins. Co.*, 33 Fed. 232.

³¹⁸ *Vanderhoef v. Agricultural Ins. Co.*, 46 Hun (N. Y.), 328.

³¹⁹ *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, 82 N. W. 313.

³²⁰ *Limburg v. German Fire Ins. Co.*, 90 Iowa, 709.

³²¹ *Hill v. Ohio Ins. Co.*, 99 Mich. 466, 58 N. W. 359; *Stupetski v. Transatlantic Fire Ins. Co.*, 43 Mich. 373, 5 N. W. 401; *Johnson v.*

vision in a policy that if the insured premises should cease to be occupied, or should become vacant and unoccupied, the policy should be void, has no application to the vacancy of a house unoccupied at the time it was insured and not thereafter used as a residence up to the time of the loss, or which is insured as "unoccupied."³²²

Prohibited Use.

When a policy contains no express prohibition of change in the use of the insured building, the fact that at the time of the loss it was used for a different purpose than that mentioned in the policy, does not *per se* avoid the policy.³²³ Naphtha is not "kept" but "used" on the premises, within the meaning of an insurance policy, where for nearly four weeks a naphtha torch is used in burning the paint on the insured building, preparatory to repainting. The word "kept" implies a use of the premises as a place of deposit for the prohibited articles, for a considerable time.³²⁴ Where a policy contains a provision that if the building shall be used as a storehouse the rate of insurance will be changed, and the in-

Norwalk Fire Ins. Co., 175 Mass. 529, 56 N. E. 569; Cummins v. Agricultural Ins. Co., 67 N. Y. 260; Moody v. Amazon Ins. Co., 52 Ohio St. 12, 26 L. R. A. 313.

³²² Bennett v. Agricultural Ins. Co., 106 N. Y. 243; Hilton v. Phoenix Assur. Co., 92 Me. 272, 42 Atl. 412. As to effect of a provision that the policy shall be void if the building be or become vacant or unoccupied, and so remain for ten days, when the vacancy exists at the time of effecting the insurance, see Clifton Coal Co. v. Scottish U. & N. Ins. Co., 102 Iowa, 300, 71 N. W. 433; Home Fire Ins. Co. v. Kuhlman, 58 Neb. 488, 78 N. W. 936. For construction of vacancy clause in Minnesota standard policy, see Doten v. Aetna Ins. Co., 77 Minn. 474, 80 N. W. 630. For Ohio standard policy, see Moody v. Amazon Ins. Co., 52 Ohio St. 12, 26 L. R. A. 313.

³²³ Martin v. Capital Ins. Co., 85 Iowa, 643, 52 N. W. 534.

³²⁴ First Congregational Church v. Holyoke Mut. Fire Ins. Co., 158 Mass. 475; Williams v. New England Mut. Fire Ins. Co., 31 Me. 219.

surer knew of the use of the building for storage, the policy will not be avoided.³²⁵ Where a contract of insurance by the written portion covers property to be used in conducting a particular business, the keeping of an article ordinarily and necessarily used in such business will not avoid the policy, even though expressly prohibited in the printed conditions.³²⁶ If in the descriptive clause of the policy the thing insured be mentioned in general terms (as, for instance, a stock of watchmaker's or photographer's materials), and there be nothing in the policy itself indicating with exactness what articles were embraced in, and intended to be covered by, such general terms, parol evidence is admissible to explain the ambiguity, and to apply the policy to the subject of the insurance. If the written agreement is full, explicit, and unambiguous, it must be taken as conclusively representing the real contract of the parties, and neither will be permitted by parol to vary its terms. If for want of fullness of statement the contract is indefinite or uncertain, parol evidence is admissible, not to vary, add to or take from the contract, but to explain and make apparent the real intention of the parties.³²⁷ But if a policy read "on general merchandise, consisting of dry goods, clothing, and groceries," and expressly prohibiting the keeping of gunpowder, it is not sufficient to show that gunpowder is included by usage and custom under the words "general merchandise," but it must be shown that it is included under the specific words "dry goods, clothing and groceries."³²⁸

³²⁵ *Steers v. Home Ins. Co.*, 38 La. Ann. 952.

³²⁶ *Faust v. American Fire Ins. Co.*, 91 Wis. 158, 64 N. W. 883.

³²⁷ *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202; *Maril v. Connecticut Fire Ins. Co.*, 95 Ga. 604; *Harper v. New York City Ins. Co.*, 22 N. Y. 441; *Hall v. Insurance Co. of North America*, 58 N. Y. 292, 17 Am. Rep. 255; *Faust v. American Fire Ins. Co.*, 91 Wis. 158.

³²⁸ *Liverpool & L. & G. Ins. Co. v. Van Os*, 63 Miss. 431.

The condition in a policy, issued to a silver-plating company, on the tools and machinery in its factory, "that this entire policy, unless otherwise indorsed hereon, or added hereto, shall be void if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the premises, gasoline, etc.," does not preclude the use of gasoline, it being so used at the date of the policy, and the use being necessary, and only a necessary amount being brought into the factory at a given time.³²⁹ But it has been held that under a clause in a policy providing that fire-works should not be covered by the insurance therein included, under the name of "fire-crackers," which were permitted to be kept, it cannot be shown that they constitute an article in the line of business of the insured described in the policy.³³⁰

A policy allowing kerosene to be stored on the premises only for "lights," "lamps to be filled and trimmed by daylight, only," forbids drawing kerosene by lamplight for sale or loan, when this act results in an explosion which destroys the building insured.³³¹ A provision voiding a policy upon a stock of goods in a store if gasoline is kept on the premises, covers the taking it to the store to be used in a gasoline stove, in an up-stairs room, having no direct connection with the store, but reached by an outside stairway.³³² A clause prohibiting the

³²⁹ *Fraim v. National Fire Ins. Co.*, 170 Pa. St. 151, 32 Atl. 613.

³³⁰ *Steinbach v. Relief Fire Ins. Co.*, 13 Wall. (U. S.) 183. See, also, as to prohibited articles in connection with general description of property insured, *Bentley v. Lumbermen's Ins. Co.*, 191 Pa. St. 276, 43 Atl. 209; *Davis v. Pioneer Furniture Co.*, 102 Wis. 394, 78 N. W. 596; *American Cent. Ins. Co. v. Green*, 16 Tex. Civ. App. 531, 41 S. W. 74; *Fischer v. London & L. Fire Ins. Co.*, 83 Fed. 807; *Snyder v. Dwelling House Ins. Co.*, 59 N. J. Law, 544, 37 Atl. 1022; *London & L. Fire Ins. Co. v. Fischer (C. C. A.)*, 92 Fed. 500; *Mechanics' & Traders' Ins. Co. v. Floyd (Ky.)*, 49 S. W. 543.

³³¹ *Gunther v. Liverpool & L. & G. Ins. Co.*, 34 Fed. 501.

³³² *Boyer v. Grand Rapids Fire Ins. Co. (Mich.)*, 83 N. W. 124.

use of wood, except to start an engine, forbids the use of it as fuel for operating purposes, even for a short time.³³³

Increase of Risk or Hazard.

Policies of insurance, unless the language excludes the presumption, must be presumed to be made with reference to the character and nature of the property insured, and to the for which such property is ordinarily held and used. The owner's use of it in the ordinary manner, and for the purposes insurer assumes all the risk incident to such use, considering the nature of the property, and the purposes to which it is adapted, and liable to be put. A condition against increase of risk refers to an increase beyond that which the company assumes.³³⁴ A statement in a policy of fire insurance that the building is used for a specific purpose, amounts to a warranty that it was so used at the time the policy was issued, but it does not warrant the continuance of such use during the existence of the insurance.³³⁵ A substantial compliance with a continuing covenant against increase of risk, whereby the risk is not increased, is sufficient.³³⁶ But a substantial breach will avoid a policy, even where the transaction constituting the breach in no way contributes to the loss.³³⁷ Whether the hazard and risk is increased by a certain new use of a building,

³³³ *Thurston v. Burnett & B. D. F. Mut. Fire Ins. Co.*, 98 Wis. 476, 74 N. W. 131. See, also, as to prohibited use, *Greenwich Ins. Co. v. Dougherty* (N. J.), 42 Atl. 485; *Olson v. St. Paul F. & M. Ins. Co.*, 35 Minn. 432; *Kelley v. Worcester Mut. Fire Ins. Co.*, 97 Mass. 284.

³³⁴ *Holbrook v. St. Paul F. & M. Ins. Co.*, 25 Minn. 229.

³³⁵ *Baker v. German Fire Ins. Co.*, 124 Ind. 490, 24 N. E. 1041; *Herrick v. Union Mut. Fire Ins. Co.*, 48 Me. 558; *Cumberland Valley Mut. Protection Co. v. Douglas*, 58 Pa. St. 419; *Wynne v. Liverpool & L. & G. Ins. Co.*, 71 N. C. 121; *Germania Fire Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 868.

³³⁶ *Bankhead v. Des Moines Ins. Co.*, 70 Iowa, 387.

³³⁷ *Kircher v. Milwaukee Mechanics' Mut. Ins. Co.*, 74 Wis. 470.

or a change in the surrounding circumstances, is a question of fact to be determined by a jury, and the opinion of experts is not conclusive upon the question.³³⁸ But it has been held that men experienced in the insurance business may give their opinion as to whether or not a certain change in the use of the insured premises increases the risk.³³⁹ A provision avoiding a policy if the hazard is increased by the erection of a contiguous building does not include the erection of a building twenty-five feet away.³⁴⁰ In order to charge the insured with the duty of giving notice of increase of risk, it must be shown that he had actual knowledge thereof.³⁴¹ Conditions avoiding the policy in case of increase of risk without the consent of the company, apply only to the premises insured, or to the property under the control of the insured.³⁴² Mere temporary change in the use and occupation of premises, which does not in any way contribute to the loss, is not within an inhibition against an increase of risk.³⁴³ But a material change in the hazard, so great as to be apparent to one of ordinary intelligence, will relieve the insurer from liabil-

³³⁸ *Joyce v. Maine Ins. Co.*, 45 Me. 168; *Kircher v. Milwaukee Mechanics' Mut. Ins. Co.*, 74 Wis. 470.

³³⁹ *Russell v. Cedar Rapids Ins. Co.*, 78 Iowa, 216. See, also, *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236.

³⁴⁰ *Olson v. St. Paul F. & M. Ins. Co.*, 35 Minn. 432; *Crete Farmers' Mut. Township Ins. Co. v. Miller*, 70 Ill. App. 599.

³⁴¹ *Rife v. Lebanon Mut. Ins. Co.*, 115 Pa. St. 530. If an uninsured building is damaged during the life of the policy by other causes than those insured against, so as to increase the hazard of the risk, and the insurer, with the knowledge of these facts, does not cancel the policy, it will sometimes be held for a subsequent loss by fire. *Fireman's Fund Ins. Co. v. Congregation Rodeph Sholom*, 80 Ill. 558.

³⁴² *State Ins. Co. v. Taylor*, 14 Colo. 499, 20 Am. St. Rep. 281.

³⁴³ *Adair v. Southern Mut. Ins. Co.*, 107 Ga. 297, 33 S. E. 78, 45 L. R. A. 207; *Holbrook v. St. Paul F. & M. Ins. Co.*, 25 Minn. 229; *Angier v. Western Assur. Co.*, 10 S. D. 82, 71 N. W. 761; *First Congregational Church v. Holyoke Mut. Fire Ins. Co.*, 158 Mass. 475.

ity.³⁴⁴ The existence of a chattel mortgage upon insured property is of itself an increase of risk, and a decrease of the security of the insurer, even though no right of action has accrued on the mortgage.³⁴⁵ If a policy stipulates that it shall be void in case the risk be increased, an increase of risk will relieve the insurer, although it may in no way have contributed to the loss.³⁴⁶ The vacancy of an insured building has been held to increase the risk, as a matter of law;³⁴⁷ and the use of naphtha in burning paint off an insured building;³⁴⁸ and the storing of loose unbaled hay;³⁴⁹ or fire-works.³⁵⁰

A policy providing that it shall become void in case the situation or circumstances affecting the risk shall be altered so as to increase the hazard, with the knowledge or consent of the insured, and without the assent of the insurer, is rendered absolutely void by a temporary increase of risk, caused by the manner of using the premises, and which is not a casual, inadvertent, or unavoidable use, and the policy will

³⁴⁴ *Thurston v. Burnett & B. D. F. Mut. Fire Ins. Co.*, 98 Wis. 476, 41 L. R. A. 316.

³⁴⁵ *Lee v. Agricultural Ins. Co.*, 79 Iowa, 379, 44 N. W. 683.

³⁴⁶ *Martin v. Capital Ins. Co.*, 85 Iowa, 643, 52 N. W. 534.

³⁴⁷ *White v. Phoenix Ins. Co.*, 83 Me. 279, 22 Atl. 167, 85 Me. 97, 26 Atl. 1049. Compare *Jones v. Granite State Fire Ins. Co.*, 90 Me. 40, 37 Atl. 327.

³⁴⁸ *First Congregational Church v. Holyoke Mut. Fire Ins. Co.*, 158 Mass. 475.

³⁴⁹ *Dittmer v. Germania Ins. Co.*, 23 La. Ann. 458.

³⁵⁰ *Betcher v. Capital Fire Ins. Co.*, 78 Minn. 241; *Steinbach v. Relief Fire Ins. Co.*, 13 Wall. (U. S.) 183. As to what constitutes increase of risk, see *Brighton Mfg. Co. v. Reading Fire Ins. Co.*, 33 Fed. 232; *Bowlus v. Phenix Ins. Co.*, 133 Ind. 106, 20 L. R. A. 400; *Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 553, 5 L. R. A. 646; *Martin v. Capital Ins. Co.*, 85 Iowa, 643, 52 N. W. 534; *Adair v. Southern Mut. Ins. Co.*, 107 Ga. 297, 33 S. E. 78, 45 L. R. A. 207; *Luce v. Dorchester Mut. Fire Ins. Co.*, 110 Mass. 361.

not revive upon the cessation of such increase of risk before the destruction of the property by fire.³⁵¹

Operation of Factory or Business.

Construing a condition against vacancy or non-operation in view of the subject matter of the contract and its ordinary incidents, it has been held that a saw mill lying idle temporarily for lack of water or logs to manufacture, while the logs were expected daily, did not cease to be operated,³⁵² nor a mill shut down for temporary repairs,³⁵³ or for want of a supply of materials,³⁵⁴ or because of the prevalence of disease.³⁵⁵ A condition in a fire insurance policy, forbidding the cessation of the operation of the insured establishment without the consent of the insurer, and providing for the care and supervision of the workmen, and also providing that a breach of such condition should avoid the policy, is broken and the insurance terminated when the business is discontinued, and the operation of the establishment has ceased without the consent of the insurer, although watchmen are

³⁵¹ *Kyte v. Commercial Union Assur. Co.*, 149 Mass. 116; *Fabyan v. Union Mut. Fire Ins. Co.*, 33 N. H. 203; *Cronin v. Fire Ass'n of Philadelphia*, 123 Mich. 277, 82 N. W. 45; *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452; *Carey v. German Am. Ins. Co.*, 84 Wis. 80; *Betcher v. Capital Fire Ins. Co.*, 78 Minn. 241. But see *Mutual Fire Ins. Co. v. Coatesville Shoe Factory*, 80 Pa. St. 412; *Lane v. Maine Mut. Fire Ins. Co.*, 12 Me. 44; *Insurance Co. of North America v. McDowell*, 50 Ill. 120; *American Fire Ins. Co. v. Brighton Cotton Mfg. Co.*, 125 Ill. 131; *Moore v. Phoenix Ins. Co.*, 62 N. H. 240; *Hopkins v. Phoenix Ins. Co.*, 78 Iowa, 344.

³⁵² *City P. & S. Mill Co. v. Merchants' M. & C. Mut. Fire Ins. Co.*, 72 Mich. 654, 40 N. W. 777; *Whitney v. Black River Ins. Co.*, 72 N. Y. 117.

³⁵³ *Day v. Mill-Owners' Mut. Fire Ins. Co.*, 70 Iowa, 710; *Brighton Mfg. Co. v. Redding Fire Ins. Co.*, 33 Fed. 232.

³⁵⁴ *American Fire Ins. Co. v. Brighton Cotton Mfg. Co.*, 125 Ill. 131.

³⁵⁵ *Poss v. Western Assur. Co.*, 7 Lea (Tenn.), 704, 40 Am. Rep. 68.

provided and kept continuously until the fire and loss occurs.³⁵⁶

To constitute occupancy of a building for manufacturing purposes there must be some practical use or employment of the property for those purposes.³⁵⁷ Machinery and apparatus used in the business of manufacturing leather and moroccoe, including a boiler and engine, etc., do not constitute a mill or manufactory.³⁵⁸

Residence and Travel.

An insured has the right to reside in a foreign country without further permission or payment, where the policy and application described him as residing there, although he is specially permitted by the policy to travel in other places, and an indorsement in the policy gives him permission to travel there upon the payment of a certain sum.³⁵⁹ The expression "settled limits of the United States" means the established boundary of the Union, and includes territory beyond the region of actual settlement, and within the geographical limits of the country.³⁶⁰ A policy conditioned to be void if the assured should pass the limits of the United States was indorsed with a permission to the insured to voyage

³⁵⁶ *Dover Glass Works Co. v. American Fire Ins. Co.*, 1 Marvel (Del.), 32, 65, Am. St. Rep. 264. See, also, *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165; *Halpin v. Aetna Fire Ins. Co.*, 120 N. Y. 70; *Cronin v. Fire Ass'n of Philadelphia*, 123 Mich. 277, 82 N. W. 45.

³⁵⁷ *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165. Compare *American Fire Ins. Co. v. Brighton Cotton Mfg. Co.*, 125 Ill. 131; *Moore v. Phenix Fire Ins. Co.*, 64 N. H. 140.

³⁵⁸ *Halpin v. Aetna Fire Ins. Co.*, 120 N. Y. 70. See *Phenix Ins. Co. v. Holcombe*, 57 Neb. 622, 78 N. W. 300. As to waiver of provisions, see *Improved Match Co. v. Michigan Mut. Fire Ins. Co.*, 22 Mich. 256, 80 N. W. 1088.

³⁵⁹ *Forbes v. American Mut. Life Ins. Co.*, 15 Gray (Mass.), 249, 77 Am. Dec. 360.

³⁶⁰ *Casler v. Connecticut Mut. Life Ins. Co.*, 22 N. Y. 427.

to California and home, via Cape Horn or Vera Cruz. The insured returned by way of Panama, the safest and shortest route. The deviation avoided the policy.³⁶¹ The policy fixes the terms upon which the promise of the assured would be binding, and upon which it should be annulled. By those terms the parties are bound. Where there is a breach of the condition the contract is rendered void.³⁶² A license to pass by sea in first class vessels, allows traveling as a steerage passenger.³⁶³ A policy permitting residence in certain prescribed localities during the entire year, prohibited residence elsewhere during certain portions of the year, and authorized the insured to travel by regular routes to and from any place within the prescribed limits, but provided that if he should pass beyond or be without those limits the policy should be void. Assured thereafter obtained permission to reside beyond those limits. On his way home he stopped within the prohibited limits to consult a physician, and on his advice went to the home of a friend, where he died. It was held that the insured was prohibited from passing beyond or being without the regions of permitted residence, except to go as a passenger by the usual routes between ports and places within those regions, and that whether the stopping at a prohibited place of residence to consult a physician and on his advice remaining over for treatment and rest was an interruption of the journey, made a mixed question of law and fact for a jury.³⁶⁴ In an action upon a life policy, indorsed upon which was a permit to the insured to reside in "any part of the United States, to

³⁶¹ *Hathaway v. Trenton Mut. Life & Fire Ins. Co.*, 11 Cush. (Mass.) 448.

³⁶² *Nightingale v. State Mut. Life Ins. Co.*, 5 R. I. 38; *Barrett v. Union Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 175.

³⁶³ *Taylor v. Aetna Life Ins. Co.*, 13 Gray (Mass.), 434.

³⁶⁴ *Converse v. Knights Templars & M. Life Ind. Co. (C. C. A.)*, 93 Fed. 148.

be North of the South bounds of Virginia by the 10th of July, 1854," it appeared that on the 11th day of June, 1854, the insured, then in Florida, was taken sick and became unable to start North, and died on July 20th, 1854; that his sickness was the sole cause of his not returning North, and that he was not guilty of any default or neglect. Held, that the sickness and death being the visitation of God, the license was not broken, and the insurers were liable.³⁶⁵

Limitations as to Time of Bringing Suit.

Conditions of policies of insurance to the effect that no suit shall be brought within a certain time after the happening of the event insured against, and limiting the time within which suit must be brought, if at all, are valid and binding, even though they be in conflict with the statute of limitations of the state wherein the action is brought.³⁶⁶ A policy limiting the time for bringing an action for the recovery of any claim thereon, includes an action upon a special agreement of the company to pay the indemnity, after it had denied all liability;³⁶⁷ and is not affected by a statute relative to the bringing of a second action within a year after the reversal of the first action.³⁶⁸ In order to determine the limitations of a policy upon bringing suit, all its provisions will be construed

³⁶⁵ *Baldwin v. New York Life Ins. & Trust Co.*, 3 Bosw. (N. Y.) 530. See, also, *Rainsford v. Royal Ins. Co.*, 33 N. Y. Super. Ct. 453; *Home Life Ins. Co. v. Pierce*, 75 Ill. 426; *Bevin v. Connecticut Mut. Life Ins. Co.*, 23 Conn. 244.

³⁶⁶ *Virginia F. & M. Ins. Co. v. Wells*, 83 Va. 736; *Bish v. Hawkeye Ins. Co.*, 69 Iowa, 184, 28 N. W. 553; *John Morrill & Co. v. New England Fire Ins. Co.*, 71 Vt. 281, 44 Atl. 358; *Wilson v. Aetna Ins. Co.*, 27 Vt. 99.

³⁶⁷ *Grier v. Northern Assur. Co.*, 183 Pa. St. 334, 39 Atl. 10.

³⁶⁸ *Hocking v. Howard Ins. Co.*, 130 Pa. St. 170; *Travelers' Ins. Co. v. California Ins. Co.*, 1 N. D. 151.

together, and will be strictly construed against the insurer, and liberally construed in favor of the insured.³⁶⁹

The authorities are in irreconcilable conflict as to whether a stipulation that suit can be brought on a policy only within a given time after the "fire" or "loss," gives the insured the specified time after the happening of the fire, or the full time after the accrual of his right of action, where the policy provides that the amount due shall not be payable until notice and proofs have been served, or some other condition required of the insured has been performed. In deciding upon this point much stress seems to have been laid upon the difference between the word "fire" and the word "loss," and the difference between the phrase "fire occurs," and the phrase "loss occurs." In *Hart v. Citizens' Ins. Co.*,³⁷⁰ it was held that a provision requiring suit upon a policy to be brought within "twelve months after the fire" requires the time to be computed from the date of the fire, and not from the time the loss is ascertained and established. The court said: "It is well settled that a clause in a contract, limiting

³⁶⁹ *Kratzenstein v. Western Assur. Co.*, 116 N. Y. 54.

³⁷⁰ 86 Wis. 77. The policy contained this provision: "Loss shall not become payable until sixty days after the notice. * * * No suit or action * * * shall be sustained * * * until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." In further support of this case, see *Egan v. Oakland Home Ins. Co.*, 29 Or. 403, 42 Pac. 990, 42 Cent. Law J. 221, 25 Ins. Law J. 534; *McFarland v. Railway O. & E. Acc. Ass'n*, 5 Wyo. 126, 27 L. R. A. 49; *Sun Ins. Co. v. Jones*, 54 Ark. 376; *Garido v. American Cent. Ins. Co. (Cal.)*, 8 Pac. 512; *Fullam v. New York Union Ins. Co.*, 7 Gray (Mass.), 61; *Rottier v. German Ins. Co. (Minn.)*, 86 N. W. 888. Opposed to Wisconsin case, see *Sun Ins. Co. v. Jones*, 54 Ark. 376; *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, 7 L. R. A. 572; *Read v. State Ins. Co.*, 103 Iowa, 307, 72 N. W. 665. See, also, *Rogers v. Home Ins. Co.*, 95 Fed. 109, 35 C. C. A. 402; *Rogers v. Aetna Ins. Co.*, 95 Fed. 103, 35 C. C. A. 396, and note 404.

the time within which an action may be commenced thereon, to a time shorter than that allowed by the statute of limitations is valid. The question here is whether the expression 'twelve months after the fire' means what it says or something else. It is to be noticed that the parties here have not used the expression 'after the loss occurs.' Had this been the language used, it might reasonably be claimed, upon authority, that the 'loss occurs' not at the date of the fire, but when the loss is ascertained and established, and the right to bring an action exists.³⁷¹ * * * There are, however, many decisions to the contrary.³⁷² Other cases, bearing more or less directly on the question, might be cited upon either side of the proposition. It seems apparent that it can hardly be said that the great weight of authority is on either side. * * * Doubtless the tendency of so many courts to construe the term 'loss' as meaning the time when liability was fixed, induced many insurance companies to substitute the word 'fire' as in the policy before us. It would seem as if the phrase 'twelve months next after the fire' was susceptible of but one meaning, yet the courts have disagreed upon this question, also. In the following cases it has been held that the word 'fire' is to be construed as meaning not the date of the fire, but the time when liability is fixed, and an action ac-

³⁷¹ Citing *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 316; *Spare v. Home Mut. Ins. Co.*, 17 Fed. 568; *Chandler v. St. Paul F. & M. Ins. Co.*, 21 Minn. 85; *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507; *German Ins. Co. v. Fairbank*, 32 Neb. 750; *Barber v. Fire & Marine Ins. Co. of Wheeling*, 16 W. Va. 658, 37 Am. Rep. 800.

³⁷² Citing *Chambers v. Atlas Ins. Co.*, 51 Conn. 17, 50 Am. Rep. 1; *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92, 33 Am. Rep. 47; *Fullam v. New York Union Ins. Co.*, 7 Gray (Mass.), 61; *Glass v. Walker*, 66 Mo. 32; *Bradley v. Phoenix Ins. Co.*, 28 Mo. App. 7; *Virginia F. & M. Ins. Co. v. Wells*, 83 Va. 736; *Peoria Sugar Refining Co. v. Canada F. & M. Ins. Co.*, 12 Ont. App. 418; *Travelers' Ins. Co. v. California Ins. Co.*, 1 N. D. 151, 8 L. R. A. 769.

crues to the insured.³⁷³ On the other hand the following cases hold that the limitation begins to run from the date of the fire.³⁷⁴ * * * It is noticeable that all of the three cases above cited, which hold that 'fire' means the time when liability is fixed, rely for authority upon the cases which construe the word 'loss' as having such meaning. No attention seems to have been given to the fact that the word 'fire' has been substituted for the word 'loss.' * * * The argument in support of this view is briefly that all clauses of the policy must be construed together; that there are clauses which necessitate the making of proofs, the submission of the assured to examination, * * * and furthermore, the loss not being payable until sixty days after the amount is fixed, it may happen that more than twelve months may elapse after the date of the fire before the company can be sued, and thus the plaintiff's action may be cut off entirely, if a literal meaning is to be given to the words. The deduction is that the parties cannot have meant what they said in the clause under consideration, but must have meant something else, which they did not say. We cannot assent to this line of reasoning. It does violence to plain words. It smacks too strongly of making a contract which the parties did not make. It construes where there is no room for construction. Plain, unambiguous words, which can have but one meaning, are not subject to construction."

The time of death by accident, and not the time when the cause of action accrues on a policy of accident insurance, is

³⁷³ *Friezen v. Allemania Fire Ins. Co.*, 30 Fed. 352; *Hong Sling v. Royal Ins. Co.*, 8 Utah, 135, 21 Ins. Law J. 718; *Case v. Sun Ins. Co.*, 83 Cal. 473, 8 L. R. A. 48.

³⁷⁴ *Steel v. Phenix Ins. Co.*, 47 Fed. 863; *State Ins. Co. v. Meesman*, 2 Wash. 459; *McElroy v. Continental Ins. Co.*, 49 Kan. 200; *King v. Watertown Fire Ins. Co.*, 47 Hun (N. Y.), 1.

the time from which is to be computed the period of one year from the date of the happening of the alleged injury within which suit must be brought by the terms of the policy, although the right of action on the policy did not accrue until the expiration of ninety days after proof of injury.³⁷⁵ A garnishment proceeding to reach the proceeds of an insurance policy, must be brought within the time limited for bringing suit upon the policy.³⁷⁶ A limitation of time to bring suit on a policy will not bar a claim upon funds in the hands of the assignee for creditors of the company, where the assignment is made within the limited period, though the claim is not filed until after its expiration.³⁷⁷ Such a stipulation does not affect the rights of an intervenor in a suit brought within the proper time.³⁷⁸ But delay in the bringing of an action, which has been caused or contributed to by the insurer or its duly authorized agents, cannot be taken advantage of by the insurer to defeat a cause of action on the policy;³⁷⁹ as the absconding of the officers of the company, thus preventing service;³⁸⁰ or fraud in obtaining a dismissal of an action brought in time;³⁸¹ or, sometimes and upon doubtful authority, where the performance of the condition is, without fault or laches on the part of the insured, rendered impossible by the

³⁷⁵ *McFarland v. Railway O. & E. Acc. Ass'n*, 5 Wyo. 126, 27 L. R. A. 49; *Kettenring v. Northwestern Masonic Aid Ass'n*, 96 Fed. 177.

³⁷⁶ *Ritter v. Boston Underwriters' Ins. Co.*, 28 Mo. App. 140.

³⁷⁷ *In re St. Paul German Ins. Co.*, 58 Minn. 163.

³⁷⁸ *Stevens v. Citizens' Ins. Co.*, 69 Iowa, 658.

³⁷⁹ *Case v. Sun Ins. Co.*, 83 Cal. 473, 8 L. R. A. 48; *Turner v. Fidelity & Casualty Co.*, 112 Mich. 425, 70 N. W. 898, 38 L. R. A. 529; *Mutual Reserve Fund Life Ass'n v. Tolbert* (Tex. Civ. App.), 33 S. W. 295; *Cochran v. London Assur. Corp.*, 93 Va. 553, 25 S. E. 597; *Jackson v. Fidelity & Casualty Co.*, 21 C. C. A. 394, 75 Fed. 359; *Matthews v. American Cent. Ins. Co.*, 154 N. Y. 449; *Phenix Ins. Co. v. Belt Ry. Co.*, 82 Ill. App. 265.

³⁸⁰ *Taber v. Royal Ins. Co.*, 124 Ala. 681, 26 So. 252.

³⁸¹ *Phenix Ins. Co. v. Belt Ry. Co.*, 82 Ill. App. 265.

acts of the insurer, or even by the act of God or of the government or of the courts.³⁸² But the mere pendency of negotiations for settlement does not postpone the running of the limitation;³⁸³ nor the refusal of an insurance company to pay a loss or recognize its liability;³⁸⁴ nor an adjustment of the loss;³⁸⁵ nor an attempt to settle the claim;³⁸⁶ nor the failure of the insurer, in an action on the policy, to plead that it was prematurely brought, until after the time for bringing an action on the policy, as fixed by its terms, had expired.³⁸⁷

After it has denied all liability upon a policy, an insurer cannot assert the plea that an action thereafter commenced is prematurely brought;³⁸⁸ but a denial of liability after action brought is not inconsistent with such a defense.³⁸⁹

A statute shortening the time of an insurance company's immunity from suit to forty instead of ninety days, and with-

³⁸² *Jackson v. Fidelity & Casualty Co.*, 21 C. C. A. 394, 75 Fed. 365; *Thompson v. Phenix Ins. Co.*, 136 U. S. 287; *Semmes v. Hartford Ins. Co.*, 13 Wall. (U. S.) 158.

³⁸³ *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425; *Ritch v. Masons' Fraternal Acc. Ass'n*, 99 Ga. 112, 25 S. E. 191.

³⁸⁴ *Farmers' Mut. Fire Ins. Co. v. Barr*, 94 Pa. St. 345.

³⁸⁵ *Willoughby v. St. Paul German Ins. Co.*, 68 Minn. 373, 71 N. W. 272.

³⁸⁶ *Law v. New England Mut. Acc. Ass'n*, 94 Mich. 266, 53 N. W. 1104; *Blanks v. Hibernia Ins. Co.*, 36 La. Ann. 599; *Shackett v. People's Mut. Ben. Soc.*, 107 Mich. 65, distinguishing *Voorheis v. People's Mut. Ben. Soc.*, 91 Mich. 469, 51 N. W. 1109.

³⁸⁷ *Wilhelmi v. Des Moines Ins. Co.*, 103 Iowa, 532, 72 N. W. 685. Compare *Phenix Ins. Co. v. Belt Ry. Co.*, 82 Ill. App. 265.

³⁸⁸ *Standard Loan & Acc. Ins. Co. v. Thornton*, 97 Tenn. 1; *Hand v. National Live-Stock Ins. Co.*, 57 Minn. 519; *Vore v. Hawkeye Ins. Co.*, 76 Iowa, 548, 41 N. W. 309. See, also, *Hayes v. Milford Mut. Fire Ins. Co.*, 170 Mass. 492, 49 N. E. 754.

³⁸⁹ *La Plant v. Firemen's Ins. Co.*, 68 Minn. 82, 70 N. W. 856. As to bringing suit within a given time after receipt of proofs, see *Provident Fund Soc. v. Howell*, 110 Ala. 508, 18 So. 311; after claim has been allowed by directors, *Southern Mut. Ins. Co. v. Turnley*, 100 Ga. 296, 27 S. E. 975.

out extending the period of the statute of limitations, affects the remedy merely, and does not impair a right, or existing contract arising out of the issuance of the policy before the statute was changed.³⁹⁰

Testimony of Physician — Proof of Death.

Stipulations waiving the provisions of law preventing a physician from disclosing information acquired while attending the insured in a professional capacity,³⁹¹ or providing that no time of absence or disappearance on the part of the insured, without proof of actual death, will entitle him to recover,³⁹² are not repugnant to law, nor against public policy.

Effect of Breach of Condition on Rights of Mortgagee.

As a general rule the breach of a condition of an insurance policy affects the insured only when the breach was caused by himself or his agents.³⁹³ The one named in the policy as owner, and not the mortgagee to whom the loss is payable, is the insured within the purview of a condition of forfeiture.³⁹⁴

The insertion in a policy of a provision commonly called the "union mortgage clause" to the effect that the loss, if any, shall be payable to the mortgagee as his interest may appear, and that the mortgagee's interest in and under the policy shall

³⁹⁰ McDonald v. Jackson, 55 Iowa, 38, 7 N. W. 408; Jones v. German Ins. Co., 110 Iowa, 75, 46 L. R. A. 860. But see Kimball v. Masons' Fraternal Acc. Ass'n, 90 Me. 183, 38 Atl. 102.

³⁹¹ Foley v. Royal Arcanum, 151 N. Y. 196, 45 N. E. 456.

³⁹² Kelly v. Supreme Council of Catholic Mut. Ben. Ass'n, 61 N. Y. Supp. 394.

³⁹³ State Ins. Co. v. Taylor, 14 Colo. 499; McKee v. Susquehanna Mut. Fire Ins. Co., 135 Pa. St. 544; Kircher v. Milwaukee Mechanics' Mut. Ins. Co., 74 Wis. 470.

³⁹⁴ Holbrook v. Baloise Fire Ins. Co., 117 Cal. 561, 49 Pac. 555; Williamson v. Michigan F. & M. Ins. Co., 86 Wis. 395; Moore v. Hanover Fire Ins. Co., 141 N. Y. 219. See American Cent. Ins. Co. v. Birds Bldg. & Loan Ass'n, 81 Ill. App. 258.

not be invalidated by any act or default of the owner, makes the mortgagee a party to the contract and gives him an interest therein; and the insurer cannot, in a suit brought by the mortgagee, take advantage of any act, default, or neglect of the insured whether prior or subsequent to the attaching of the mortgagee indemnity clause.³⁹⁵

Terms and Conditions of the Policy, Generally.

Contracts of insurance are contracts of indemnity in cases of fire insurance, or for the payment of specified sums in case of accident or life insurance, upon the terms and conditions specified in the policy or policies embodying the agreement of the parties. The insurer undertakes to guaranty the insured against loss or damage, or to make certain payments upon the terms and conditions agreed upon and upon no other, and when called upon to pay in case of loss the insurer may justly insist upon the fulfilment of those terms. The terms of the policy constitute the measure of the insurer's liability, and if it appears that the contract has been terminated by the violation, on the part of the assured, of its conditions, there can be no recovery. The parties to an insurance contract have the right to insert therein such conditions regulating the rights and liabilities and duties of each as they may agree upon, or which they may consider necessary and proper to protect their interests, and these conditions, when made, must be considered and enforced according to the expressed intent of the parties. It is not unlawful or against public policy for the contract to stipulate that upon certain conditions or contingencies, or if the insured shall do or shall not do certain things, or if

³⁹⁵ *Eddy v. London Assur. Corp.*, 143 N. Y. 311; *Humphry v. Hartford Fire Ins. Co.*, 15 Blatchf. 504, Fed. Cas. No. 6,875; *Syndicate Ins. Co. v. Bohn* (C. C. A.), 65 Fed. 165, 27 L. R. A. 614; *National Bank v. Union Ins. Co.*, 88 Cal. 497; but see *Whiting v. Burkhardt*, 60 N. E. 1; *Chandos v. American Fire Ins. Co.*, 84 Wis. 184, 19 L. R. A. 321.

certain things shall be done or happen, or shall not be done or shall not happen in regard to the subject matter of the insurance, the policy shall be void.

If the assured has violated or failed to perform the conditions of the contract, and such violation has not been waived by the insurer, then the assured cannot recover. The reason for the existence of certain conditions or provisions of the contract is immaterial. If the contract is so drawn as to be ambiguous, or to be fairly susceptible of two different constructions, that construction will be adopted which is most favorable to the insured. But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the meaning of the terms which the parties have used, and if they are clear and unambiguous these terms are to be taken and understood in their plain, ordinary and popular sense. The courts may not make a contract for the parties. Their function and duty simply consist in enforcing and carrying out the one actually made.³⁹⁶ And any condition of the contract may be binding upon the parties, though it be only contained in the application, when that is made a part of the policy.³⁹⁷ The insured must be held to a full knowledge of all the terms and conditions of his policy, and the fact that he has never signed it does not help him any more than the fact that he has not read it. His assent to all the conditions is conclusively presumed from his acceptance of the policy, and he cannot retain its benefits, and repudiate its burdens.³⁹⁸ An act violative of the terms and conditions of the policy affects the

³⁹⁶ *Thompson v. Phenix Ins. Co.*, 136 U. S. 287; *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 341; *Hartford Fire Ins. Co. v. Webster*, 69 Ill. 392.

³⁹⁷ *Mandego v. Centennial Mut. Life Ass'n*, 64 Iowa, 134, 17 N. W. 656.

³⁹⁸ *Burlington Ins. Co. v. Gibbons*, 43 Kan. 15; *Wilkins v. State Ins. Co.*, 43 Minn. 177; *Morrison v. Insurance Co. of North America*,

insured only when done by him, or by some one authorized to bind him in the premises.³⁹⁹

It is a familiar rule that forfeitures are not favored; that contracts will be strictly construed to avoid forfeitures, and that the burden is upon him who claims a forfeiture to show that he is clearly entitled to it.⁴⁰⁰ But if the words are plain courts must give effect to them accordingly, or contractual obligations will be subject to variations and violations to suit the exigencies of particular cases.⁴⁰¹

An insurer is not required to do an affirmative act declaring a forfeiture for a violation of the policy which causes the policy, by its own terms, to become void.⁴⁰² The conditions of voluntary contracts can be waived by the parties by any course of conduct inconsistent with an intention to insist upon the strict letter of the contract. The conditions of standard policies can only be waived in the manner prescribed by the policies themselves.⁴⁰³

LIABILITY OF INSURER.

§ 152. In life and accident policies the measure of recovery is not usually open to question, the amount being fixed by contract.

§ 153. The fundamental purpose of contracts of fire insurance is to furnish indemnity to the insured against pecuniary damage or loss through the operation of fire upon the property insured.

69 Tex. 353; *Cleaver v. Traders' Ins. Co.*, 71 Mich. 414; *Allen v. German American Ins. Co.*, 123 N. Y. 6.

³⁹⁹ *Eliot Five Cents Sav. Bank v. Commercial Union Assur. Co.*, 142 Mass. 142; *Insurance Co. of North America v. McDowell*, 50 Ill. 120. See ante, note 393.

⁴⁰⁰ *Aetna Life Ins. Co. v. Vandecar*, 30 C. C. A. 48, 86 Fed. 289; *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661; *Bailey v. Homestead Fire Ins. Co.*, 16 Hun (N. Y.), 503.

⁴⁰¹ *Kasten v. Interstate Casualty Co.*, 99 Wis. 73, 74 N. W. 534.

⁴⁰² *Betcher v. Capital Fire Ins. Co.*, 78 Minn. 240, 80 N. W. 971.

⁴⁰³ *O'Neil v. American Fire Ins. Co.*, 166 Pa. St. 72.

§ 154. A stipulation that the insurer may rebuild or repair property damaged by fire gives him the privilege, at his option, either to pay the damages or to rebuild or repair within the specified time, or, if no time be fixed, within a reasonable time after notice of the fire.

§ 155. An insurer is liable for breach of its agreement to insure or to continue or renew existing insurance. The measure is the damages which naturally result from the breach.

§ 156. A settlement induced by fraud or misrepresentation may be set aside.

§ 157. A building is not a "total loss" or "wholly destroyed" when there is a remnant left standing which is fit and suitable for use in rebuilding, and has a substantial value for that purpose.

Policies of life insurance and accident insurance usually fix the amount of liability and recovery so as to foreclose all dispute on that question. Fire insurance contracts are essentially contracts of indemnity, and the assured is entitled to recover from the underwriter the whole amount of a partial loss if it did not exceed the amount insured, although the amount insured be less than the value of the property at risk. In cases of personal property the measure of damages for loss of the insured property is its market value at the time and place where the loss occurred, within the amount named in the policy. In the case of damage to an insured building, the rule is indemnification to the owner, not exceeding the sum insured. The question is not what some one would have paid for the building, but what amount would indemnify the insured for the loss sustained. It is for the jury to determine in the one case the amount and extent of the loss, and in the other case the amount or extent of the damage.⁴⁰⁴

⁴⁰⁴ *State Ins. Co. v. Taylor*, 14 Colo. 499; *Steward v. Phœnix Fire Ins. Co.*, 5 Hun (N. Y.), 261; *Brinley v. National Ins. Co.*, 11 Metc. (Mass.) 195; *Com. Ins. Co. v. Sennett*, 37 Pa. St. 205, 78 Am. Dec. 418; *Mississippi Mut. Ins. Co. v. Ingram*, 34 Miss. 215.

Where goods insured against fire are destroyed, the insurer is bound to pay their value at the time of the loss; where damaged only, he is bound to pay the difference between the value in the sound and damaged condition. Where the goods are so damaged as not to be salable by the ordinary method, a fire sale at auction may, after reasonable notice to the insurers, be considered by the jury in estimating the damages, and ascertaining the proper amount of indemnity.⁴⁰⁵ Market value, and not local or peculiar value, must control.⁴⁰⁶ The right to recovery must always be founded upon an insurable interest, and ordinarily the maximum amount which one can recover on a policy is limited to the amount of his insurable interest in the subject matter of the risk.⁴⁰⁷ The amount of the policy is no evidence of the value of the property destroyed, except when the policy be valued, and the loss total. The jury must find from the evidence the actual amount of the damage, and the extent of the loss of the insured.⁴⁰⁸ In the case of the destruction of a building, where the policy was not valued, the damage would be the value of the building as it stood upon the ground on the day it was destroyed. If the building was old, and dilapidated by use and decay, its value in that condition should be the ground of recovery, not exceeding the liability of the insurer as fixed by the policy.⁴⁰⁹ If the policy stipulates that the cash value of the property

⁴⁰⁵ *Hoffman v. Western M. & F. Ins. Co.*, 1 La. Ann. 216.

⁴⁰⁶ *Fisher v. Crescent Ins. Co.*, 33 Fed. 544.

⁴⁰⁷ See ante, c. 9, "Insurable Interest;" post, c. 16, "Proceeds of Policy."

⁴⁰⁸ *Waynesboro Mut. Fire Ins. Co. v. Creaton*, 98 Pa. St. 451; *Standard Fire Ins. Co. v. Wren*, 11 Ill. App. 242.

⁴⁰⁹ *Underhill v. Agawam Mut. Fire Ins. Co.*, 6 Cush. (Mass.) 440; *Washington Mills Emery Mfg. Co. v. Weymouth & B. Mut. Fire Ins. Co.*, 135 Mass. 503; *Aetna Ins. Co. v. Johnson*, 11 Bush (Ky.), 587; *Hickerson v. German American Ins. Co.*, 96 Tenn. 193, 32 L. R. A. 172.

destroyed or damaged shall not exceed the cost of rebuilding it, and in case of damage from use or otherwise that a suitable deduction shall be made from the cost of repair, the measure of damages is the cost of repairs, if thereby the property is rendered as valuable as before. If less valuable than before, then the difference must be added to the cost. If more valuable, it must be deducted.⁴¹⁰

Where the policy provides that the loss should be ascertained according to the actual cash value of the property at the time the loss occurred, not to exceed what it would then cost the insured to repair or replace the same with material of like kind and quantity, and the insured are manufacturers of the property covered and destroyed, the proper measure of damages is the actual cash value at the time the loss occurred, and not the cost to them of manufacturing the same.⁴¹¹ Where the property insured has no recognized market value, its fair value should be the measure of damages.⁴¹² If the policy separately describes different articles of property, insuring each for a specified sum, the recovery for damage to one article cannot exceed the sum for which it was insured.⁴¹³ The term "actual cash value" means the sum of money for which the insured property would have sold, at its market price, at the time and place of its destruction.⁴¹⁴

⁴¹⁰ *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571; *German Ins. Co. v. Everett* (Tex. Civ. App.), 36 S. W. 125.

⁴¹¹ *Mitchell v. St. Paul German Fire Ins. Co.*, 92 Mich. 594, 52 N. W. 1017, distinguishing *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 117, 44 N. W. 1055. Compare *Clover v. Greenwich Ins. Co.*, 101 N. Y. 277.

⁴¹² *Gere v. Council Bluffs Ins. Co.*, 67 Iowa, 272; *Brinley v. National Ins. Co.*, 11 Metc. (Mass.) 195.

⁴¹³ *Dacey v. Agricultural Ins. Co.*, 21 Hun (N. Y.), 83; *Home Ins. Co. v. Adler*, 71 Ala. 516.

⁴¹⁴ *Mack v. Lancashire Ins. Co.*, 2 McCrary, 211, 4 Fed. 59; *Russell v. Detroit Mut. Fire Ins. Co.*, 80 Mich. 407. For definition of "working interest," see *Imperial Fire Ins. Co. v. Murray*, 73 Pa. St. 13.

If the owner of a life estate only, be insured as having an absolute title by an insurer who knows the true condition of the title, and demands and receives premium for insuring the entire ownership, it is liable to the same extent as if the assured owned the fee.⁴¹⁵

The insurer is liable for all damage which is the direct and proximate result of the peril or event insured against, but no further.⁴¹⁶

Recovery for a building shattered by lightning, and the destruction of which is completed by a high wind, must be limited to the direct loss caused by lightning, where the policy expressly excludes all damage done by wind.⁴¹⁷ A policy on a building does not cover loss of profits during repair.⁴¹⁸ Profits ordinarily cannot be recovered unless specially insured;⁴¹⁹ but they may be insured and recovered.⁴²⁰

The insurer, in estimating the actual cash value of his goods at the time of the fire, is entitled to include in such value the profits, which, added to the cost of production, constitute the value.⁴²¹ Rent constitutes a distinct insurable interest,

⁴¹⁵ *Western Assur. Co. v. Stoddard*, 88 Ala. 606; *Green v. Green*, 50 S. C. 514, 46 L. R. A. 525; *Harrison v. Pepper*, 166 Mass. 288; *Sampson v. Grogan*, 21 R. I. 174, 44 L. R. A. 711; post, c. 16.

⁴¹⁶ See ante, "Proximate Cause."

⁴¹⁷ *Beakes v. Phoenix Ins. Co.*, 143 N. Y. 402, 26 L. R. A. 267.

⁴¹⁸ *In re Wright*, 1 Adol. & E. 621; *Niblo v. North American Fire Ins. Co.*, 1 Sandf. (N. Y.) 551.

⁴¹⁹ *Niblo v. North American Fire Ins. Co.*, 1 Sandf. (N. Y.) 551; *Stock v. Inglis*, 9 Q. B. Div. 708.

⁴²⁰ *Carey v. London Provincial Fire Ins. Co.*, 33 Hun (N. Y.), 315; *Employers' Liability Assur. Corp. v. Merrill*, 155 Mass. 404, 21 N. E. 529; *National Filtering Oil Co. v. Citizens' Ins. Co.*, 106 N. Y. 535, 13 N. E. 337.

⁴²¹ *Mitchell v. St. Paul German Fire Ins. Co.*, 92 Mich. 594, 52 N. W. 1017; *Parrish v. Virginia F. & M. Ins. Co.* (N. C.), 20 Ins. Law J. 95; *Canada Sugar Refining Co. v. Insurance Co. of North America*, 175 U. S. 609; *Hartford Fire Ins. Co. v. Cannon*, 19 Tex. Civ. App. 305, 46 S. W. 851.

which is not covered by a policy on a building.⁴²² The insured will be entitled to interest upon the amount he is entitled to recover from the time fixed for payment, and not from the date of the fire.⁴²³ Proofs of loss are not conclusive upon the assured as to the extent of his damage.⁴²⁴ An insurer may be entitled to a deduction from the amount of its liability of a sum equal to the amount of its unpaid premium, although the statute of limitations would prevent its collection.⁴²⁵ The holder of a policy indemnifying him against liability from accidents occurring in connection with his business, is entitled to recover the expense of defending a suit for injuries covered by the policy, where the insurer neglected to defend after notice.⁴²⁶ The insurer is entitled to the benefit of any salvage.⁴²⁷

Rebuilding or Repairing.

The right to rebuild cannot be exercised by an insurer, except it be given him by the contract.⁴²⁸ The effect of a provision giving the insurer the right to rebuild, is to give him an option either to pay the money damage to the property destroyed, or replace it, or restore it to the condition in which it was before the fire. Giving the insurer the option to repair does not place upon him the obligation to repair, or to pay

⁴²² *Leonarda v. Phœnix Assur. Co.*, 2 Rob. (La.) 131; *Farmers' Mut. Ins. Co. v. New Holland Turnpike Co.*, 122 Pa. St. 37, 15 Atl. 563.

⁴²³ *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 553; *Webb v. Protection Ins. Co.*, 6 Ohio, 456; *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y. 141.

⁴²⁴ *Lebanon Mut. Ins. Co. v. Kepler*, 106 Pa. St. 28; *Sibley v. Prescott Ins. Co.*, 57 Mich. 14. See post, c. 13, "Proofs of Loss."

⁴²⁵ *Alexander v. Continental Ins. Co.*, 67 Wis. 422; *Home Ins. Co. v. Adler*, 71 Ala. 516.

⁴²⁶ *Mandell v. Fidelity & Casualty Co.*, 170 Mass. 173, 49 N. E. 112.

⁴²⁷ *Hough v. People's Fire Ins. Co.*, 36 Md. 398.

⁴²⁸ *Wallace v. Insurance Co.*, 4 La. 289.

the expenses of repairs made by the insured. He may refuse to repair, and pay only the damage.⁴²⁹ Where parties contract upon a subject surrounded by statutory limitations or requirements, or municipal ordinances which control the subject matter of the risk, they are presumed to have entered into their engagements with reference thereto, and these statutes and ordinances enter into and become a part of the contract, and the right to repair cannot be taken advantage of by an insurer, if the statute or ordinances governing the subject prevent repairing or rebuilding.⁴³⁰ The right to repair or rebuild only becomes operative if taken advantage of by the insurer within the time stipulated in the policy. If no time is fixed by the policy the election must be made within a reasonable time.⁴³¹ When a policy binds the company, in case of loss, to either repair or pay, an election is established by any act manifesting a choice, and the election once made is irrevocable.⁴³² The effect of electing to rebuild, and notifying the insured thereof, is to convert the policy into a building contract, and the amount named in the policy ceases to be the rule of damages. If, after the insurer has undertaken to rebuild, it desists from completing the structure, the measure of damages is the amount which will be necessary to complete the building, and restore it substantially to its former condition.⁴³³ The contract to rebuild is satisfied if the property

⁴²⁹ *Brinley v. National Ins. Co.*, 11 Metc. (Mass.) 195.

⁴³⁰ *Larkin v. Glens Falls Ins. Co.*, 80 Minn. 527, 83 N. W. 409; *Fire Ass'n of Philadelphia v. Rosenthal*, 108 Pa. St. 474; *Brady v. Northwestern Ins. Co.*, 11 Mich. 425.

⁴³¹ *Insurance Co. of North America v. Hope*, 58 Ill. 75; *Kelly v. Sun Fire Office*, 141 Pa. St. 10; *Westchester Fire Ins. Co. v. Dodge*, 44 Mich. 420; *Maryland Home Fire Ins. Co. v. Kimmell*, 89 Md. 437, 43 Atl. 764.

⁴³² *Fire Ass'n of Philadelphia v. Rosenthal*, 108 Pa. St. 474.

⁴³³ *Beals v. Home Ins. Co.*, 36 N. Y. 522; *Zalesky v. Iowa State Ins.*

is made as good as it was before the fire.⁴³⁴ If the insured prevents the insurer from exercising his option to rebuild, he can recover nothing on his policy.⁴³⁵ After an election to rebuild is made the insurer must proceed with the work with all reasonable despatch.⁴³⁶ An insurer in possession for the purpose of rebuilding, is under no obligation to pay rent, until after the lapse of a reasonable time for completion of repairs.⁴³⁷ An election to rebuild waives all known defenses available to the insurer;⁴³⁸ and is a waiver of the right to arbitrate.⁴³⁹ The converse of this would seem to be true;⁴⁴⁰ unless the policy or stipulation for arbitration otherwise provide.⁴⁴¹ The denial of all liability under a policy, and refusal to pay the loss, is a waiver of the right to exercise the option to rebuild.⁴⁴² An insurer is not liable for the falling of an uninsured party wall, during the reconstruction of the

Co., 102 Iowa, 512, 70 N. W. 187; *Morrell v. Irving Fire Ins. Co.*, 33 N. Y. 429, 88 Am. Dec. 396.

⁴³⁴ *Franklin Fire Ins. Co. v. Hamill*, 5 Md. 170.

⁴³⁵ *Beals v. Home Ins. Co.*, 36 N. Y. 522.

⁴³⁶ *Home District Mut. Ins. Co. v. Thompson*, 1 Up. Can. Err. & App. 247; *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 553; *Haskins v. Hamilton Mut. Ins. Co.*, 5 Gray (Mass.), 432.

⁴³⁷ *St. Paul F. & M. Ins. Co. v. Johnson*, 77 Ill. 598. See *Parker v. Eagle Fire Ins. Co.*, 9 Gray (Mass.), 152. Rebuilding; several insurers: *Good v. Buckeye Mut. Fire Ins. Co.*, 43 Ohio St. 394; *Morrell v. Irving Fire Ins. Co.*, 33 N. Y. 429.

⁴³⁸ *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 553; *Bersche v. Globe Mut. Ins. Co.*, 31 Mo. 546; *Bersche v. St. Louis Mut. F. & M. Ins. Co.*, 31 Mo. 555.

⁴³⁹ *Zalesky v. Iowa State Ins. Co.*, 102 Iowa, 512, 70 N. W. 187; *Wynkoop v. Niagara Fire Ins. Co.*, 91 N. Y. 478.

⁴⁴⁰ *Elliott v. Merchants' & Bankers' Fire Ins. Co.*, 109 Iowa, 39, 79 N. W. 452; *McAllaster v. Niagara Fire Ins. Co.*, 156 N. Y. 80, 50 N. E. 502.

⁴⁴¹ *Platt v. Aetna Ins. Co.*, 153 Ill. 113, 26 L. R. A. 853; *Langan v. Aetna Ins. Co.*, 96 Fed. 705.

⁴⁴² *Western Home Ins. Co. v. Richardson*, 40 Neb. 1, 58 N. W. 597.

insured premises.⁴⁴³ A clause in a policy giving the insurer the right to rebuild or repair, is solely for the benefit of the parties to the policy, and no one else can interpose to prevent its performance, or take advantage of the failure to give the notice within the prescribed time.⁴⁴⁴

Contribution and Pro-rating.

A provision limiting the liability of the insurer to such proportion of the loss as the sum insured bears to the whole amount of the insurance, refers to such amount at the time of the loss, and does not make it obligatory upon the assured to continue insurance in force when the policy is written.⁴⁴⁵ A provision that the loss shall be apportioned among all insurers, applies only where there is other valid insurance. There is no theory of apportionment of contribution, which will relieve an insurer from its liability to the full amount, until the insured has received the indemnity stipulated for.⁴⁴⁶ The contribution only refers to policies insuring the same interest.⁴⁴⁷ There can be no apportionment where the loss exceeds the total amount of insurance.⁴⁴⁸

⁴⁴³ *Alter v. Home Ins. Co.*, 50 La. Ann. 1316, 24 So. 180.

⁴⁴⁴ *Stamps v. Commercial Fire Ins. Co.*, 77 N. C. 209, 24 Am. Rep. 443.

⁴⁴⁵ *Lattan v. Royal Ins. Co.*, 45 N. J. Law, 453; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507. See, also, on pro-rating, *Sun Ins. Office v. Varble* (Ky.), 46 S. W. 486, 27 Ins. Law J. 798; *Breed v. Providence Wash. Ins. Co.*, 17 Blatchf. 287, Fed. Cas. No. 1,826; *Sherman v. Madison Mut. Ins. Co.*, 39 Wis. 104.

⁴⁴⁶ *Jersey City Ins. Co. v. Nichol*, 35 N. J. Eq. 291; *Niagara Fire Ins. Co. v. Heenan & Co.*, 81 Ill. App. 678; *Niagara Fire Ins. Co. v. Scammon*, 144 Ill. 490.

⁴⁴⁷ *Traders' Ins. Co. v. Pacaud*, 150 Ill. 245. 'For effect of Union Mortgage Clause, see *Eddy v. London Assur. Corp.*, 143 N. Y. 311, 25 L. R. A. 686; *Hartford Fire Ins. Co. v. Williams* (C. C. A.), 63 Fed. 925; *Page v. Sun Ins. Office*, 64 Fed. 194.

⁴⁴⁸ *Ogden v. East River Ins. Co.*, 50 N. Y. 388; *Pencil v. Home Ins.*

Successive Fires.

The insurer is bound to indemnify the insured during the period covered by the policy against one and all of the perils insured against, not however to an amount in excess of the face of the policy. Thus, the insurers will be obliged to pay upon the second loss the difference between the amount insured, and what they had already paid on a previous loss.⁴⁴⁹ If, under a valued policy, the property is totally destroyed as the result of two or more fires, the measure of recovery for the final loss is the total amount of insurance written, less the amount paid in settlement of previous losses.⁴⁵⁰

Breach of Contract.

The liability of an insurer for failure to issue a policy of insurance, or to insure property according to his agreement, has been dealt with elsewhere.⁴⁵¹ An insurer must always respond in damages for its failure to carry out the contract made by it. The damages recoverable in any case for a breach of contract, are such as naturally result from the act complained of. It has been held that purely fraternal benefit associations are not liable in damages for an unlawful cancellation of a membership, because such a corporation acts purely as a trustee to collect and distribute a sick or death fund, and

Co., 3 Wash. 485; *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213. See, also, on contribution and pro-rating, *Teague v. Germania Fire Ins. Co.*, 71 Ala. 473; *Peoria M. & F. Ins. Co. v. Wilson*, 5 Minn. 53 (Gil. 37); *Gandy v. Orient Ins. Co.*, 52 S. C. 224, 29 S. E. 655, 27 Ins. Law J. 575; *Chandler v. Insurance Co. of North America*, 70 Vt. 562, 41 Atl. 502; *Lesure Lumber Co. v. Mutual Fire Ins. Co.*, 101 Iowa, 514, 70 N. W. 761; *Page v. Sun Ins. Office (C. C. A.)*, 74 Fed. 203; *Erb v. Fidelity Ins. Co.*, 99 Iowa, 727, 69 N. W. 261.

⁴⁴⁹ *Curry v. Com. Ins. Co.*, 10 Pick. (Mass.) 535, 20 Am. Dec. 547.

⁴⁵⁰ *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, 82 N. W. 313. See, also, *Hamburg-Bremen Fire Ins. Co. v. Garlington*, 66 Tex. 103; *Trull v. Roxbury Mut. Fire Ins. Co.*, 3 Cush. (Mass.) 263; *Batchelder v. Insurance Co. of North America*, 30 Fed. 459.

⁴⁵¹ Ante, c. 3.

has no power to collect money except for that purpose.⁴⁵² But damages are recoverable against other insurance corporations, for an unlawful forfeiture of a contract of insurance, or for failure to receive premiums, or refusal to deliver any contract agreed to be delivered. There are decisions to the effect that the measure of damages for a breach of a life insurance contract is the amount of premiums paid, with interest. But the sounder rule is that the damages are to be measured by the position occupied by the parties at the time the breach occurs. If at that time the health of the insured has become impaired to such an extent as to make it impossible for him to secure other insurance, the extent of his damages would be different than if new insurance could be had. If he could at that time take similar insurance in a responsible company, the measure of damages would be the difference between the cost of such new insurance for the term of his natural life, according to the mortuary tables, and the cost of carrying the canceled policy for the same period upon the terms previously made. But if his health had become impaired, so that new insurance could not be procured, the measure of damages would seem to be the present value of the policy, as of the date of death, less the estimated cost of carrying the same, from the date of cancellation.⁴⁵³

A re-classing of members in a mutual company, is not a repudiation of a policy or certificate.⁴⁵⁴ The measure of recovery in an action for rescission of a contract induced by

⁴⁵² *Lavalle v. Societe St. Jean Baptiste*, 17 R. I. 680, 24 Atl. 467.

⁴⁵³ *Ebert v. Mutual Reserve Fund Life Ass'n*, 81 Minn. 116, 83 N. W. 506; *Speer v. Phœnix Mut. Life Ins. Co.*, 36 Hun (N. Y.), 322. See, also, *Brooklyn Life Ins. Co. v. Weck*, 9 Ill. App. 358; *Alabama Gold Life Ins. Co. v. Garmany*, 74 Ga. 51; *Clemmitt v. New York Life Ins. Co.*, 76 Va. 355; *New York Life Ins. Co. v. Clemmitt*, 77 Va. 366.

⁴⁵⁴ *Lee v. Mutual Reserve Fund Life Ass'n*, 97 Va. 160, 33 S. E. 556.

false representations, is the amount of premiums paid, with interest.⁴⁵⁵ The measure of damages for breach of an agreement to assign a policy of insurance, is the cost of the insurance for the unexpired term of the policy, not the damage caused by the subsequent destruction of the insured property.⁴⁵⁶ The measure of damages for the breach of a contract to deliver a paid-up policy, where there is an existing risk, is the value of such policy at the time of demand, with interest thereon.⁴⁵⁷ Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform—as, in case of a re-insurance, a transfer of assets, or insolvency of an insurer—the other may regard the contract as terminated, and recover whatever damage he has sustained thereby.⁴⁵⁸

Distribution of Surplus — Mutual Company.

The equitable share of the surplus of a mutual insurance company, which a policy holder should be credited with, is such share as may, with due regard to the safety of all policy holders, and the security of the business of the company, in the exercise of a proper discretion, be thus credited. No title to any part of such surplus, which will enable a policy holder to maintain an action at law for its recovery until the dis-

⁴⁵⁵ *Rohrschneider v. Knickerbocker Life Ins. Co.*, 76 N. Y. 216.

⁴⁵⁶ *Dodd v. Jones*, 137 Mass. 322.

⁴⁵⁷ *Phoenix Mut. Life Ins. Co. v. Baker*, 85 Ill. 410; *Rumbold v. Penn Mut. Life Ins. Co.*, 7 Mo. App. 71. See, also, *American Life Ins. & Trust Co. v. Shultz*, 82 Pa. St. 46; *Watts v. Phoenix Mut. Life Ins. Co.*, 16 Blatchf. 228, Fed. Cas. No. 17,294.

⁴⁵⁸ *Lovell v. St. Louis Mut. Life Ins. Co.*, 111 U. S. 264; *People v. Empire Mut. Life Ins. Co.*, 92 N. Y. 106; *Mason v. Cronk*, 125 N. Y. 503; *Insurance Com'r v. Provident Aid Soc.*, 89 Me. 413, 36 Atl. 627; *Davenport Fire Ins. Co. v. Moore*, 50 Iowa, 626; *People v. Security Life Insurance & Annuity Co.*, 78 N. Y. 114; *Universal Life Ins. Co. v. Binford*, 76 Va. 103.

tribution is made by the officers of the company, is given by a policy providing that the members shall be entitled to participate in the distribution of the surplus according to such principles and methods as may from time to time be adopted, which are expressly ratified and accepted by him.⁴⁵⁹ A court will not interfere in the apportionment or distribution, unless fraud or irregularity be shown.⁴⁶⁰

Avoidance of Settlement.

An adjustment or a settlement of a loss cannot be opened or set aside except upon the ground either of fraud or mistake of facts not known. If there was fraud in the original contract, or any ground for its avoidance, not known when the loss was paid, or if the loss was paid in ignorance of some circumstances attending it which if known would have enabled the insurers to resist the claim, the money may be recovered back. But if they knew when they paid the loss, or upon inquiry might have informed themselves, of the grounds upon which they might have resisted the claim, they cannot afterwards recover it back, for this would open the door for infinite litigation.⁴⁶¹

⁴⁵⁹ *Greeff v. Equitable Life Assur. Soc.*, 160 N. Y. 19, 46 L. R. A. 288.

⁴⁶⁰ *Gadd v. Equitable Life Assur. Soc.*, 97 Fed. 834. See, also, *Hines v. Mutual Life Ins. Co. (Ky.)*, 33 S. W. 202, 25 Ins. Law J. 555; *Greeff v. Equitable Life Assur. Soc.*, 160 N. Y. 19, 46 L. R. A. 288.

⁴⁶¹ *Dow v. Smith*, 1 Caines (N. Y.), 32; *Farmers' & Merchants' Ins. Co. v. Chesnut*, 50 Ill. 111; *Mutual Life Ins. Co. v. Wager*, 27 Barb. (N. Y.) 367; *Whipple v. North British & M. Fire Ins. Co.*, 11 R. I. 129; *Milne v. Northwestern Life Assur. Co.*, 23 Misc. Rep. 553, 52 N. Y. Supp. 766; *Belt v. American Cent. Ins. Co.*, 29 App. Div. 546, 53 N. Y. Supp. 316; *Wood v. Massachusetts Mut. Acc. Ass'n*, 174 Mass. 217, 54 N. E. 541; *Stache v. St. Paul F. & M. Ins. Co.*, 49 Wis. 89, 35 Am. Rep. 773; *Nebraska & I. Ins. Co. v. Segard*, 29 Neb. 354, 45 N. W. 681; *Northwestern Mut. Life Ins. Co. v. Elliott*, 5 Fed. 225. See ante, c. 3.

Total Loss.

The term "total loss," or "wholly destroyed," as used in a valued policy, does not imply an absolute extinction of the component parts of a building insured. It refers to a condition of the building, after it has been damaged to such an extent that the remnant left standing is either unfit for use in rebuilding, or is so damaged that a prudent owner, uninsured, desiring just such a building as was damaged by fire, would not deem it practicable, or economical, to use the remnant in rebuilding. There can be no total loss of a building, so long as the remnant of the structure standing is reasonably adapted for and has a substantial value for use as a basis on which to restore the building to the condition in which it was before the injury. And whether it is so adapted depends upon the question whether a reasonably prudent owner, uninsured, desiring such a structure as the one in question was before the injury, would, in proceeding to replace the damaged building, utilize such remnant in so doing. Upon this issue evidence as to the cost of repairing and restoring the building is admissible.⁴⁶² The words "total loss" or "wholly destroyed," when applied to a building, mean totally destroyed as a building; that is, that the walls, although standing, are unsafe to use for the purpose of rebuilding, and must be torn down, and a new building erected throughout.⁴⁶³

Keeping in view the fact that the contract of insurance is essentially a contract of indemnity, it is difficult to understand how a building can be said to be totally destroyed so long as any parts of it which are subject to the action of fire re-

⁴⁶² *Providence Wash. Ins. Co. v. Board of Education of Morgantown School Dist.* (W. Va.), 30 Ins. Law J. 601, 38 So. 679; *Corbett v. Spring Garden Ins. Co.*, 155 N. Y. 389; *Ampleman v. Citizens' Ins. Co.*, 35 Mo. App. 308, 320, 18 Ins. Law J. 393; *Northwestern Mut. Life Ins. Co. v. Rochester German Ins. Co.*, 88 N. W. 265.

⁴⁶³ *German Ins. Co. v. Eddy*, 36 Neb. 461, 19 L. R. A. 707.

main standing, and can, without removal, be effectively, and with a substantial saving in cost, utilized in its reconstruction, so that the building, when rebuilt, shall be in as good condition as it was before the fire.⁴⁶⁴ But there is a line of authorities sustaining an opposite view, and holding that the test is whether the building has lost its identity and specific character as a building, and become so far disintegrated that it cannot be properly designated as a building.⁴⁶⁵

It would seem that the practical difficulties in the application of the rule last mentioned are almost insuperable. Few of the cases following it have presented any question as to the substantial value of the remnant and its practical use for purposes of rebuilding such a structure as was damaged. Of this the supreme court of Texas has well said: "To push the idea of 'destruction in specie' to the extent of excluding all consideration of the adaptability of the remainder of the structure for use in restoring the building to its original condition, * * * would leave us with practically no guide, as it would be more difficult to determine the meaning of 'destruction in specie' as thus limited, than of 'total loss.' It would logically result in denying recovery for a total loss

⁴⁶⁴ *Ampleman v. Citizens' Ins. Co.*, 35 Mo. App. 308, 320, 18 Ins. Law J. 393. See, also, *Insurance Co. of North America v. Bachler*, 44 Neb. 549, 62 N. W. 911; *Ohage v. Union & Miner Ins. Co.*, 85 N. W. 212; *Murphy v. American Cent. Ins. Co. (Tex. Civ. App.)*, 54 S. W. 407; *Hamburg-Bremen Fire Ins. Co. v. Garlington*, 66 Tex. 103, 33 Cent. Law J. 319; *Larkin v. Glens Falls Ins. Co.*, 80 Minn. 527, 83 N. W. 409; *Manchester Fire Assur. Co. v. Feibelman*, 118 Ala. 308, 23 So. 759.

⁴⁶⁵ *Williams v. Hartford Ins. Co.*, 54 Cal. 442; *O'Keefe v. Liverpool, L. & G. Ins. Co.*, 140 Mo. 564, 41 S. W. 922; *Oshkosh Packing & Provision Co. v. Mercantile Ins. Co.*, 31 Fed. 200. See, also, *Seyk v. Millers' Nat. Ins. Co.*, 74 Wis. 67; *Lindner v. St. Paul F. & M. Ins. Co.*, 93 Wis. 526, 67 N. W. 1125; *Palatine Ins. Co. v. Weiss (Ky.)*, 59 S. W. 509.

in a case where the exterior form of the building remains, though the interior be so damaged that the entire remnant of the structure is valueless as a basis upon which to restore the building to its original condition, and would permit a recovery for a total loss in a case where an inexpensive portion of the building has been destroyed, though the most valuable and substantial portion remains uninjured, and capable of being utilized with great advantage in such restoration. To so hold would virtually be to abandon the principle of indemnity lying at the basis of all legitimate insurance, and to hold out to the owner, instead thereof, a fair chance, if not an inducement, to profit by the partial destruction of his property."⁴⁶⁶

Machinery placed in a mill building, and firmly attached to it, is real property subject to the provisions of a valued-policy law.⁴⁶⁷

Total Disability.

"Wholly disabled," "permanently disabled," and "total disability," as used in policies of accident and benefit insurance, are relative terms, and apply to the physical condition of the insured, in connection with the business in which he is engaged. They refer to incapacity of the insured to prosecute his business, and to his inability to perform substantially the duties necessarily incident to his occupation.⁴⁶⁸

⁴⁶⁶ Royal Ins. Co. v. McIntyre, 90 Tex. 170, 35 L. R. A. 672.

⁴⁶⁷ British American Assur. Co. v. Bradford, 60 Kan. 82, 55 Pac. 335, 28 Ins. Law J. 262. See Havens v. Germania Fire Ins. Co., 123 Mo. 403, 24 Ins. Law J. 321; Aetna Ins. Co. v. Glasgow Electric Light & Power Co. (Ky.), 28 Ins. Law J. 992.

⁴⁶⁸ See ante, "Total Disability," notes 163, 165, 125, 126; Lobdill v. Laboring Men's Mut. Aid Ass'n, 69 Minn. 14; Turner v. Fidelity & Casualty Co., 112 Mich. 425, 38 L. R. A. 529, and notes thereto.

Recovery by Insured from One Causing Fire.

The rule is well settled that where, by the actionable negligence of any person, insured property is damaged or destroyed, the owner of the property can recover his entire loss from the tort-feasor, without regard to the amount of insurance there may be on the property.⁴⁶⁹ The assured may have two rights of action, but he has only one damage. If he recovers against the tort-feasor, he thereby diminishes his claim against the insurer to the extent of the amount recovered.⁴⁷⁰

⁴⁶⁹ *Cunningham v. Evansville & T. H. R. Co.*, 102 Ind. 478, 1 N. E. 800; *Lake Erie & W. R. Co. v. Griffin*, 8 Ind. App. 47, 35 N. E. 396.

⁴⁷⁰ *Hart v. Western R. Corp.*, 13 Metc. (Mass.) 99; *Chickasaw County Farmers' Mut. Fire Ins. Co. v. Weller*, 98 Iowa, 731, 68 N. W. 443; *Anderson v. Miller*, 96 Tenn. 35, 31 L. R. A. 604. See post, c. 17, "Subrogation."

CHAPTER XIII.

NOTICE AND PROOFS OF LOSS.

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STIPULATIONS OF POLICY.

§ 158. Conditions in insurance policies requiring the insurer to furnish notice and proofs of loss are valid, and must be complied with, unless waived by the insurer.

Insurance policies usually contain some provisions requiring the insured to furnish to the insurer either within a

stated or a reasonable time after accident, loss or damage, for which claim under the policy is to be made, notice of loss, or proofs of loss, or both. The consequences attendant upon a failure to comply with these conditions depend upon the wording of the policy. All the rights of the insured will, in some cases, be forfeited; in others, his right to sue on the policy will only be postponed and delayed until full compliance. The provisions concerning notice of loss and proofs of loss are severable and distinct. The giving of proofs may be notice, but the giving of notice does not dispense with proofs, if the policy requires the giving of the latter. These provisions are inserted for the benefit of the insurer. The object is to give it information which it might otherwise be able to obtain only with great difficulty, if at all, and upon which its rights might depend. The conditions may be waived by the insurer, either expressly, or by acts or conduct from which an intent to waive is clearly inferable. If the policy is silent as to the kind of notice required, either verbal or written notice is sufficient; but if written notice be stipulated for, it must be furnished. Such provisions are valid; but as they savor of the nature of forfeitures, they are liberally construed in favor of the insured.¹

¹ *McLaughlin v. Washington County Mut. Ins. Co.*, 23 Wend. (N. Y.) 525, 2 Bennett, Fire Ins. Cas. 17; *Prendergast v. Dwelling House Ins. Co.*, 67 Mo. App. 426; *Bartlett v. Union Mut. Fire Ins. Co.*, 46 Me. 500; *American Cent. Ins. Co. v. Hathaway*, 43 Kan. 399; *Eiseman v. Hawkeye Ins. Co.*, 74 Iowa, 11, 36 N. W. 780; *Niagara Fire Ins. Co. v. Scammon*, 100 Ill. 644; *Scammon v. Germania Ins. Co.*, 101 Ill. 621; *Lane v. St. Paul F. & M. Ins. Co.*, 50 Minn. 227; *Tripp v. Provident Fund Soc.*, 140 N. Y. 23, 22 L. R. A. 432; *Peele v. Provident Fund Soc.*, 147 Ind. 543; *Matthews v. American Cent. Ins. Co.*, 154 N. Y. 449, 39 L. R. A. 433; *Paltrovich v. Phoenix Ins. Co.*, 143 N. Y. 73, 25 L. R. A. 198; *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. (U. S.) 390; *German Ins. Co. v. Davis*, 40 Neb. 700, 59 N. W. 698; *Weidert v. State Ins. Co.*, 19 Or. 261, 24 Pac. 242; *Gamble*

SAME — CONSTRUCTION.

§ 159. The stipulations of a policy which relate to the procedure merely, after the occurrence of a loss, are to be reasonably and not rigidly construed, when this can be done without violating the express terms of the contract.

The contract of insurance being a voluntary one, the insurers have a right to designate the terms upon which they will become liable for a loss. The insurer and insured can, in the absence of legislative interference, make a contract to their mutual liking, and can insert in it such conditions and agreements as they choose, regulating the rights, duties and obligations of each, both before and after loss; providing always they are not unreasonable or contrary to public policy or the law of the land. And when the parties have made their own contract, have agreed upon their own terms and assented to certain conditions, the courts cannot change them and must not permit them to be violated or disregarded. The conditions may seem harsh and useless, but they are the result of the meeting of the minds of parties capable in law of contracting, and if they have not been waived, or if one party has not been prevented from complying by the act of the other, all conditions must be respected and enforced. The province of a court is merely to construe and not to make contracts; hence it follows that where the terms of a policy are explicit and unambiguous, a court can only enforce it as an ordinary contract, giving to the provisions their ordinary meaning and effect, and rejecting any portions which are obnoxious to the objections above mentioned.

v. Accident Assur. Co., 4 Ir. R. C. L. 204; Northwestern Ins. Co. v. Atkins, 3 Bush (Ky.), 333. The insolvency of a credit guaranty insurance company during the life of a policy issued by it is such a breach of the contract as will entitle the insured to recover on a quantum meruit without furnishing the proof stipulated for. Smith v. National Credit Ins. Co., 65 Minn. 283, 33 L. R. A. 511.

But when the conditions and requirements of a policy are vague, indefinite, or uncertain, and when a literal construction would lead to manifest injustice to the insured, and a liberal but still reasonable construction would prevent injustice, the latter should be adopted, because the parties are presumed, when the language used by them permits, to have intended a reasonable and not an unreasonable result.

What the insured absolutely must do in the way of giving notice of proofs of loss, is often difficult to determine. The conditions bearing on this question are frequently found scattered through different portions of the policy. These must all be read together in ascertaining what compliance on the part of insured is made essential to his right of recovery.²

Thus where a policy after prescribing that immediate notice must be given to the insurer and specifying the particulars to be stated in the notice, declares "that the failure to give such immediate notice, mailed within ten days from the happening of the accident, shall invalidate all claims under the certificate," the forfeiture clause is properly construed as being intended to apply to the failure to give a prompt notice, and not to the omission from a notice promptly furnished of some particular enumerated in the former clause.³

² *Aetna Ins. Co. v. People's Bank of Greenville* (C. C. A.), 62 Fed. 224; *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 25, 10 Pet. 507; *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672; *Carpenter v. German American Ins. Co.*, 52 Hun (N. Y.), 249; *Heywood v. Maine Mut. Acc. Ass'n*, 85 Me. 289; *Phillips v. United States Benev. Soc.*, 120 Mich. 142, 79 N. W. 2; *Trippe v. Provident Fund Soc.*, 140 N. Y. 23; *Matthews v. American Cent. Ins. Co.*, 154 N. Y. 449, 39 L. R. A. 433; *Peele v. Provident Fund Soc.*, 147 Ind. 543; *Badger v. Glens Falls Ins. Co.*, 49 Wis. 389; cases ante. See post, § 168, "Liberal Construction of Conditions."

³ *Martin v. Manufacturers' Acc. Ind. Co.*, 151 N. Y. 95.

SAME — MUTUAL COMPANIES.

§ 160. The same rules govern both stock and mutual insurance companies.

Provisions in By-laws of Mutual Companies.

If the by-laws of a mutual insurance company are made part of the contract of insurance, any provisions they may contain regulating the time or manner of giving notice or proof and the contents thereof, are binding upon the insured equally as if incorporated in the contract itself.⁴

But where a by-law of a sick benefit association requires of the insured as a condition precedent to recovery, the furnishing of proofs certified to by a medical examiner who is the appointee and agent of the insurer, and the insured upon being taken sick promptly notified the insurer and thereafter in due time furnished proofs in proper form except that they were not certified to by the medical examiner, who without fault or neglect of the insured, had refused to sign them, it was held that the defendant could not escape liability because of such negligence, omission or default of its own agent.⁵

STATUTORY REGULATION.

§ 161. The giving of notice and proofs of loss is sometimes regulated by statute.

In some states the legislature has limited the time within which proof or notice can be required by the insurer. In

⁴ *Smith v. Haverhill Mut. Fire Ins. Co.*, 1 Allen (Mass.), 297, 79 Am. Dec. 733; *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20.

⁵ *Young v. Grand Council, A. O. of A.*, 63 Minn. 506, distinguishing *Lane v. St. Paul F. & M. Ins. Co.*, 50 Minn. 227. See, also, *Supreme Council, C. B. L., v. Boyle*, 10 Ind. App. 301; *Anderson v. Supreme Council, O. of C. F.*, 135 N. Y. 107; *Lorscher v. Supreme Lodge, K. of H.*, 72 Mich. 316, 40 N. W. 545; *Sheanon v. Pacific Mut. Life Ins. Co.*, 83 Wis. 507, 53 N. W. 878; *Albert v. Order of Chosen Friends*, 34 Fed. 721.

Maine, an act was passed in 1893 to the effect that no stipulation in an accident insurance policy which limits the time within which notice shall be given to a period of less than sixty days (amended in 1895 to thirty days) after the accident, shall be valid. This act does not apply however, to any contracts previously made. No legislative enactment can make invalid a provision in an executed policy otherwise valid.⁶

And the Indiana statute (Burns' Rev. St. 1894, § 4923) declares invalid, as unreasonable, a condition requiring that the notice of loss shall be furnished immediately or within five days, and requires of the insured only reasonable diligence in giving the notice. Under this statute notice given within fifteen days is given within a reasonable time.⁷

DISTINCTION BETWEEN NOTICE AND PROOF SOMETIMES REQUIRED.

§ 162. If notice of loss and proof of loss are required by the policy they must both be furnished within the prescribed time.

Where notice and proof are both required as conditions precedent to a right of action under the contract, they are distinct and separate acts, and both must be furnished. Proof of loss, if seasonably made, might serve for both the proof and notice contemplated, as the more authentic and verified information contained in the proofs would ordinarily convey all the particulars which would be communicated by the in-

⁶ Heywood v. Maine Mut. Acc. Ass'n, 85 Me. 289; Kimball v. Masons' Fraternal Acc. Ass'n, 90 Me. 183; Bailey v. Hope Ins. Co., 56 Me. 474.

⁷ Germania Fire Ins. Co. v. Deckard, 3 Ind. App. 361, 28 N. E. 868; Insurance Co. of North America v. Brim, 111 Ind. 281; Trippe v. Provident Fund Soc., 140 N. Y. 23. See, also, Gen. St. Conn. § 2839; Rev. St. Me. 1883, p. 446, § 21; 2 Rev. St. Ind. 1888, § 3770; Rev. Laws Vt. 1880, § 3626; Gen. Laws Minn. 1895, c. 175, § 25.

formal notice, but the converse is not true. A mere notice cannot supply the place of or dispense with the more formal proof provided for in the policy.⁸

And a statement of loss which complies with the statute and the requirements of the policy both as to notice and proof and is served in time, will suffice for both, even though intended by the insured only as a notice.⁹

But because both notice and proof are required by the policy it does not follow that they must be both given at the same time. The giving of a notice may be waived by the insurer without thereby waiving the service of the proof.¹⁰

SEVERAL POLICIES OF SAME INSURER.

§ 163. A single notice or proof to an insurer carrying several policies may suffice.

Where two policies upon the same life, issued by the same company, call for the same proof of death and proofs under one policy are accepted without objection, the representatives of the insured are not bound, in the absence of a special requirement to that effect, to furnish other proofs under the second policy.¹¹

In New York it has been held that four policies, all similar

⁸ *O'Reilly v. Guardian Mut. Life Ins. Co.*, 60 N. Y. 173; *Underwood Veneer Co. v. London G. & A. Co.*, 100 Wis. 378, 75 N. W. 996; *Foster v. Fidelity & Casualty Co.*, 99 Wis. 447, 75 N. W. 69; post, note 63.

⁹ *Parks v. Anchor Mut. Fire Ins. Co.*, 106 Iowa, 402, 76 N. W. 743.

¹⁰ *Central City Ins. Co. v. Oates*, 86 Ala. 558; *Niagara Fire Ins. Co. v. Scammon*, 100 Ill. 644; *Lane v. St. Paul F. & M. Ins. Co.*, 50 Minn. 227; *O'Reilly v. Guardian Mut. Life Ins. Co.*, 60 N. Y. 173; *Graves v. Merchants' & Bankers' Ins. Co.*, 82 Iowa, 637; *Badger v. Glens Falls Ins. Co.*, 49 Wis. 389, 5 N. W. 845; *Rines v. German Ins. Co.*, 78 Minn. 46, 80 N. W. 839; *Killips v. Putnam Fire Ins. Co.*, 28 Wis. 472; *Summerfield v. Phoenix Assur. Co.*, 65 Fed. 292.

¹¹ *Girard Life I., A. & T. Co. v. Mutual Life Ins. Co.*, 97 Pa. St. 15.

except as to dates, amounts, and numbers, issued by the same insurer upon the same property, constitute essentially one policy; and proofs of loss on one, followed by a description of the other three, are sufficient.¹²

NO POLICY ISSUED.

§ 164. The furnishing of notice or proof of loss is not a condition precedent to the maintenance of a suit for breach of an oral agreement to insure.

The neglect of the insured to make a certificate and proofs of loss within the time required by the ordinary policies of the insurer, will not prevent a recovery in an action for breach of a parol contract to insure property destroyed and to issue a policy thereon,¹³ unless the form of policy contemplated be fixed by law and requires proofs.^{13a}

But in a suit upon a contract to issue a policy of insurance (though none was in fact issued) there can be no recovery for a loss, unless the conditions as to notice and statements of loss, contained in policies of the form usually issued by the insurer, are complied with or waived.¹⁴

¹² *Dakin v. Liverpool, L. & G. Ins. Co.*, 13 Hun, 122, 77 N. Y. 600.

¹³ *Nebraska & I. Ins. Co. v. Seivers*, 27 Neb. 541, 43 N. W. 351; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390; *Gold v. Sun Ins. Co.*, 73 Cal. 216; *New England F. & M. Ins. Co. v. Robinson*, 25 Ind. 536; *Campbell v. American Fire Ins. Co.*, 73 Wis. 100, 40 N. W. 661; *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 49 Cent. Law J. 467. See, also, *Woody v. Old Dominion Ins. Co.*, 31 Grat. (Va.) 362; *Baile v. St. Joseph F. & M. Ins. Co.*, 73 Mo. 371-387; *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 266.

^{13a} *Hicks v. British American Assur. Co.*, 162 N. Y. 284.

¹⁴ *Barre v. Council Bluffs Ins. Co.*, 76 Iowa, 609, 41 N. W. 373; *American Cent. Ins. Co. v. Simpson*, 43 Ill. App. 98.

Quære: Whether the difference in the forms of action is the basis of the different results arrived at.

TOTAL LOSS UNDER VALUED POLICY.

§ 165. Proofs must be furnished if required by the conditions of a valued policy even though the loss be total.

The authorities are conflicting on the question as to whether proofs are necessary in case of total loss under a valued policy. The better reasoning would seem to be that they are, and that the insurer is entitled to the benefit of the information which is required in the proofs as distinguished from the meagre statements found in a notice. The federal courts hold that the provisions of a policy requiring the furnishing of proofs must be complied with, even though the loss be total and the value of the property destroyed exceeds the amount for which it is insured.¹⁵ But Pennsylvania and Texas have held that where the policy is a valued one and the loss total, and notice of loss has been properly given, proofs are unnecessary.¹⁶ And Michigan has held that the provisions of a policy requiring the insured in case of fire to separate the damaged and undamaged property and make a complete inventory thereof, does not require an inventory of property totally destroyed.¹⁷

COMPUTATION OF TIME.

§ 166. The time for furnishing notice and proofs is computed by the rules that obtain in the construction of other contracts.

The time for furnishing notice or proofs of loss usually begins to run from the date of the loss. The ordinary rules

¹⁵ *Summerfield v. Phenix Assur. Co.*, 65 Fed. 292; *McCollum v. Hartford Fire Ins. Co.*, 67 Mo. App. 76.

¹⁶ *Pennsylvania Fire Ins. Co. v. Dougherty*, 102 Pa. St. 568; *Roe v. Dwelling House Ins. Co.*, 149 Pa. St. 94; *Wellcome v. People's Equitable Mut. Fire Ins. Co.*, 2 Gray (Mass.), 480; *Harkins v. Quincy Mut. Fire Ins. Co.*, 16 Gray (Mass.), 591; *Georgia Home Ins. Co. v. Leaverton* (Tex. Civ. App.), 33 S. W. 579; *Weiss v. American Fire Ins. Co.*, 148 Pa. St. 350, 23 Atl. 991. See, also, *Meyer v. Insurance Co. of North America*, 73 Mo. App. 166.

¹⁷ *Johnston v. Farmers' Fire Ins. Co.*, 106 Mich. 96, 64 N. W. 5.

governing the computation of time control.¹⁸ In some cases the provisions of policies have been so construed that time does not begin to run till after the discovery of the loss or accident for which claim is to be made.¹⁹

CONDITIONS REQUIRING STRICT PERFORMANCE.

§ 167. Furnishing notice of loss or proofs of loss, or both, within a specified time is often a condition precedent to a right of action by the insured.

When a policy of insurance requires notice of loss, or proof of loss, or both, to be furnished to the insurer within certain prescribed periods after the happening of the fire, damage, loss, death, or accident for which claim under the policy is to be made, as a condition precedent to the right to maintain an action on the policy, such provisions must be strictly complied with to enable the insured to recover, and a failure so to do, will, unless waived by the insurer, operate to defeat a recovery under the policy.²⁰ But a policy requiring notice of loss to be

¹⁸ Ante, notes 1-6, 19; *Badger v. Glens Falls Ins. Co.*, 49 Wis. 389, 5 N. W. 845.

¹⁹ *Trippe v. Provident Fund Soc.*, 140 N. Y. 23, 22 L. R. A. 432; *Peele v. Provident Fund Soc.*, 147 Ind. 543; *Cooper v. United States Mut. Ben. Ass'n*, 132 N. Y. 334, 16 L. R. A. 138; *Kentzler v. American Mut. Acc. Ass'n*, 88 Wis. 589, 60 N. W. 1002; *Hoffman v. Manufacturers' Acc. Ind. Co.*, 56 Mo. App. 301; *Wooddy v. Old Dominion Ins. Co.*, 31 Grati. (Va.) 362; *Konrad v. Union Casualty & Surety Co.*, 49 La. Ann. 636; *Mandell v. Fidelity & Casualty Co.*, 170 Mass. 173; *Coventry Mut. Life Stock Ins. Ass'n v. Evans*, 102 Pa. St. 281; *American Surety Co. v. Pauly*, 170 U. S. 133; *Phillips v. United States Benev. Soc.*, 120 Mich. 142, 79 N. W. 1. But see *Foster v. Fidelity & Casualty Co.*, 99 Wis. 447, 75 N. W. 69; *Underwood Veneer Co. v. London G. & A. Co.*, 100 Wis. 378, 75 N. W. 996.

²⁰ *Swain v. Security Live-Stock Ins. Co.*, 165 Mass. 322; *Riddlebarger v. Hartford Ins. Co.*, 7 Wall. (U. S.) 390; *Weidert v. State Ins. Co.*, 19 Or. 261, 24 Pac. 242; *Gould v. Dwelling House Ins. Co.*, 90 Mich. 302, 51 N. W. 455; *Scammon v. Germania Ins. Co.*, 101 Ill.

furnished within a given time will not be construed as forfeiting the rights of the insured for failure so to do, unless such result be clearly stipulated for.²¹ Thus under an accident insurance policy providing that it does not cover disappearances, and requiring positive proof of death to be furnished within six months from the date of the accident, the time for furnishing proofs of death does not expire in six months from the disappearance of the insured, where his body is not found and his death not certainly ascertained until more than six months after his disappearance.²²

The knowledge of the insurer that a loss has occurred, does not relieve the insured from the duty of giving notice and making proofs of loss according to the terms of the policy.²³ Otherwise if the insurer acts upon any information which

621; *Heywood v. Maine Mut. Acc. Ass'n*, 85 Me. 289; *Gamble v. Accident Assur. Co.*, 4 Ir. R. C. L. 204; *California Sav. Bank v. American Surety Co.*, 87 Fed. 118; *Underwood v. Farmers' Joint Stock Ins. Co.*, 57 N. Y. 500; *Southern Home B. & L. Ass'n v. Home Ins. Co.*, 94 Ga. 167, 27 L. R. A. 844; *Brock v. Des Moines Ins. Co.*, 96 Iowa, 39, 64 N. W. 685; *Bowlin v. Hekla Fire Ins. Co.*, 36 Minn. 433; *Shapiro v. Western Home Ins. Co.*, 51 Minn. 239; and cases *infra*.

²¹ *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672, and cases *supra*; *Carpenter v. German American Ins. Co.*, 52 Hun (N. Y.), 249; *Trippe v. Provident Fund Soc.*, 140 N. Y. 23; *Kentzler v. American Mut. Acc. Ass'n*, 88 Wis. 589, 60 N. W. 1002.

²² *Kentzler v. American Mut. Acc. Ass'n*, 88 Wis. 589, 60 N. W. 1002. The policy in this case read: "Notice in writing * * * shall be given the secretary of the association, * * * with full particulars of the accident and injury, immediately after the accident occurs. Proofs of death, in like manner and time, shall be verified by the attending physician or some other person having personal knowledge of the fact; and unless positive proof of death or injury * * * shall be furnished to the association [insurer] within six months, * * * then all claims thereon shall be forfeited."

²³ *Nebraska & I. Ins. Co. v. Seivers*, 27 Neb. 541, 43 N. W. 351; *Smith v. Haverhill Mut. Fire Ins. Co.*, 1 Allen (Mass.), 297; *California Sav. Bank of San Diego v. American Surety Co.*, 87 Fed. 119.

he may have concerning the loss.²⁴ The provisions of a policy that the written notice must be given to the insurer forthwith after the occurrence of a loss, and that preliminary proofs of loss must be furnished within sixty days from the date of the fire, and that the failure to comply with these terms and conditions of the policy shall cause a forfeiture of all claims under the policy, are valid and binding upon the insured; and in a suit upon the policy it is necessary for the insured to plead and prove that such notice and proofs of loss were fully furnished to the company within the specified time, or were waived by the company.²⁵

So also where the policy contains a limitation upon the time within which suit can be brought, and a further provision that proofs must be furnished within a certain time, and that no action shall be maintained unless the insured has fully complied with all the requirements of the policy.²⁶ In

²⁴ *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473, 61 N. W. 740; *Peele v. Provident Fund Soc.*, 147 Ind. 543; *Roumage v. Mechanics' Fire Ins. Co.*, 13 N. J. Law, 110, 1 Bennett, Fire Ins. Cas. 389.

²⁵ *German Ins. Co. v. Davis*, 40 Neb. 700, 59 N. W. 698; *Weidert v. State Ins. Co.*, 19 Or. 261, 24 Pac. 242; *Bowlin v. Hekla Fire Ins. Co.*, 36 Minn. 433; *Shapiro v. Western Home Ins. Co.*, 51 Minn. 239. In this case the policy provided that in case of loss, etc., the assured shall within sixty days render an account of the loss or damage, stating, etc. * * * The loss shall be due and payable after satisfactory proofs of the same, as required hereinbefore, shall have been made by the insured under the limitations of the policy, and received by the company. No suit or action on this policy for recovery of any claim shall be sustainable until after all conditions, stipulations, requirements, and provisions of this policy shall have been complied with, nor unless commenced within six months next ensuing after the fire. *Sergeant v. London & L. & G. Ins. Co.*, 85 Hun (N. Y.), 31.

²⁶ *Gould v. Dwelling House Ins. Co.*, 90 Mich. 302, 51 N. W. 455; *Blossom v. Lycoming Fire Ins. Co.*, 64 N. Y. 162; *Johnson v. Dakota F. & M. Ins. Co.*, 1 N. D. 167, 45 N. W. 799; *Scammon v. Germania Ins. Co.*, 101 Ill. 621.

Gould v. Dwelling House Ins. Co.^{26a} the policy provided that "in case of loss the insured shall give immediate notice thereof in writing to this company, and within thirty days thereafter shall render a sworn statement to the company. No suit or action on this policy shall be sustainable in any court unless the insured shall have fully complied with all the foregoing provisions, nor unless commenced within six months after the loss;" and strict compliance was required. In Steele v. German Ins. Co. of Freeport,²⁷ the policy differed only in the use of the word "until" in the place of the word "unless." Distinguishing between these two words the court held that strict compliance was not necessary in the latter case, and that proofs need not be furnished within the stipulated time. In Johnson v. Dakota F. & M. Ins. Co.,^{27a} the loss was not payable "until requisite proofs duly certified and sworn to by assured * * * are received at the office of the company. * * * All loss and damage under this policy shall be due and payable between the 20th day of November and the first day of December of the year in which the loss occurs." Held, that this created a condition precedent that proofs must be furnished, and that a failure so to do avoided the policy, but that the time to furnish proofs did not expire before November 20th following the fire.

And a mistake by the insured in misdirecting proofs of loss mailed by him to the insurer, resulting in the latter not receiving the proofs until after the expiration of the period within which they were required to be furnished, is fatal to the right to recover on the policy.²⁸ A provision in an employers'

^{26a} 90 Mich. 302, 51 N. W. 455.

²⁷ 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85, citing Tubbs v. Dwelling House Ins. Co., 84 Mich. 646, 48 N. W. 296. And see Aurora F. & M. Ins. Co. v. Kranich, 36 Mich. 293.

^{27a} 1 N. D. 167, 45 N. W. 799.

²⁸ Madúox v. Dwelling-House Ins. Co., 56 Mo. App. 343.

liability policy that it is issued subject to the agreement and condition that, upon the occurrence of an accident and also on the receipt of a claim for damages resulting from such accident, the assured shall give immediate notice thereof to the insurer, makes the giving of such notices at the time specified a condition precedent to recovery, even though the policy contains no forfeiture clause.²⁹

Under a bond conditioned to indemnify an employer against loss from the dishonesty of an employe, requiring notice of any claim thereunder to be given within three months after the dishonesty has been discovered and within three months after the expiration of the bond, recovery cannot be had for a loss resulting from such dishonesty during the original term of the bond unless such notice is given within three months after the termination thereof; and the time is not extended by a renewal of the bond on the same terms for a further period.³⁰

An insured cannot maintain an action, unless, within sixty days after a fire, he gives notice and proofs of loss under a policy, providing loss or damage shall be "paid within sixty days after due notice and proof thereof made by the insured, in conformity to the conditions annexed to this policy," one of said conditions being "Persons sustaining loss or damage by fire shall forthwith give notice thereof in writing to the company, and within sixty days from the occurring of said fire they shall deliver as particular an account of their loss and damage as the nature of the case will admit."³¹ Under a policy requiring immediate notice of any accident and in-

²⁹ *Underwood Veneer Co. v. London G. & A. Co.*, 100 Wis. 378, 75 N. W. 996; *Eastern R. Co. v. Relief Fire Ins. Co.*, 98 Mass. 420.

³⁰ *De Jernette v. Fidelity & Casualty Co.*, 17 Ky. Law Rep. 1088, 25 Ins. Law J. 315, 33 S. W. 828.

³¹ *Eastern R. Co. v. Relief Fire Ins. Co.*, 98 Mass. 420.

jury for which claim is to be made, and affirmative proof of death within two months from the time of death, a failure to give both immediate notice of an injury resulting in death and proof of death within two months, will defeat recovery.³² Under a policy of accident insurance stipulating that the failure to notify the company of an injury for ten days after it is received shall bar all claim, no suit can be maintained if notice of an accident is not given until twenty-six days thereafter, notwithstanding the fact that a request was made of the insurer for blank proofs of loss and that it demanded further information as to the nature and circumstances of the injury.³³

In a recent Massachusetts case involving the construction and validity of the provisions of an insurance policy covering live stock, it appeared that the horse insured died twenty hours after being taken sick, and that no notice had been given the insurer till after its death. The policy read, "If the animal becomes sick or disabled, the insured shall notify the company within fifteen hours, and the company may send one of its surgeons to treat the case." It

³² Foster v. Fidelity & Casualty Co., 99 Wis. 447, 75 N. W. 69.

³³ Heywood v. Maine Mut. Acc. Ass'n, 85 Me. 289; Kimball v. Masons' Fraternal Acc. Ass'n, 90 Me. 183. Contra, Hoffman v. Manufacturers' Acc. Ind. Co., 56 Mo. App. 301.

In Heywood v. Maine Mut. Acc. Ass'n, *supra*, the policy stipulated that "in the event of * * * injury for which claim may be made under this certificate, * * * immediate notice shall be given [the insurer] in writing; * * * and failure to give such written notice within ten days of the occurrence of such accident shall invalidate all claims under this certificate." The court said: "It was competent for the parties to make the agreement, and they are bound by it. The plaintiff neglected to notify the company of any accident or injury to himself until twenty-six days had elapsed. * * * The evidence shows no waiver on part of the company. * * * Plaintiff cannot recover."

was held that a failure to give notice within the specified time barred any right of recovery.³⁴ But time would not begin to run until the insured had knowledge of the facts upon which he based his claim.³⁵

The condition in a fidelity insurance bond that the insurer shall be notified in writing at its office of any act on the part of the employe which may involve a loss creating responsibility against the insurer, as soon as practicable after the occurrence shall have come to the knowledge of the employer, and that any claim thereunder shall be made as soon as possible after the discovery of the loss, is a material stipulation, and conformity to it is a condition precedent to the recovery on the bond.³⁶

In case of loss by fire after the death of the original insured, and before the appointment of a legal representative, those interested in the policy must make reasonable efforts to see that the covenants as to notice and proof of loss are kept, and within a reasonable time must use such agencies as the law provides to secure that result.³⁷

Union Mortgage Clause.

It has been decided that the so-called "New York Standard mortgage clause" in a policy of insurance which declares in substance that no act or claim of the mortgagor shall defeat the insurance as to the interest of the mortgagee, does not dispense with the making of the proofs of loss stipulated for in the policy and within the time stipulated. If the mortga-

³⁴ *Swain v. Security Live Stock Ins. Co.*, 165 Mass. 322.

³⁵ *Mandell v. Fidelity & Casualty Co.*, 170 Mass. 173; *Coventry Mut. Live Stock Ins. Ass'n v. Evans*, 102 Pa. St. 281.

³⁶ *California Sav. Bank of San Diego v. American Surety Co.*, 87 Fed. 118.

³⁷ *Matthews v. American Cent. Ins. Co.*, 154 N. Y. 449, 39 L. R. A. 433; *Germania Fire Ins. Co. v. Curran*, 8 Kan. 9.

gee would not have the right in all cases to furnish the proof, he certainly would have in a case where the mortgagor refuses to do so, but in all cases, unless waived by the insurer, it must be furnished by one or the other.³⁸

LIBERAL CONSTRUCTION OF CONDITIONS.

§ 168. A very liberal construction of conditions is sometimes made to avoid a forfeiture of the rights of an insured.

There are however cases, where exceptional circumstances and the impossibility of compliance with the liberal terms of the contract, have influenced the courts towards a more liberal construction of these clauses in the policy; and this upon the principle that a liberal construction, if it be a reasonable one, and will prevent injustice, should be adopted when a literal construction would lead to manifest injustice. These cases make a distinction between conditions preceeding the loss or accident and upon which the question of liability primarily rests, and conditions which relate to matters following such loss or accident, interpreting the former, which are more usually of the essence of the contract, more strictly; and the latter relating to the giving of notice, making proofs of loss, etc., that is, conditions subsequent to the capital fact of liability, as requiring only what is reasonably possible of the claimant. This is especially true in the construction of life and accident insurance policies; but I can see no good reason why, if the rule be sound—as it seems to be—it should not be applicable to all classes and kinds of insurance contracts, providing the circumstances and conditions exist which allow of its use without violating the agreement between the insurer and the insured. Thus where an accident insurance policy requires

³⁸ Southern Home B. & L. Ass'n v. Home Ins. Co., 94 Ga. 167, 27 L. R. A. 844. See contra, Dwelling House Ins. Co. v. Kansas Loan & Trust Co., 5 Kan. App. 137, 26 Ins. Law J. 603, 48 Pac. 891.

notice of death of the person insured and full particulars of the accident and injury to be given within ten days from the date of the injury or death, and provides that the failure so to do shall invalidate all claims under the policy, and where the policy further provides that the insurance does not cover disappearances nor injury of which there is no visible mark on the person of the insured, it has been held that failure to give the insurer notice of the death of a person killed in the falling of a building until eleven days after the accident, is not fatal to the recovery on a policy, even though the insured was missing for eleven days, and it was supposed during all of that time that he was buried in the ruins, but the body was not discovered until ten days before the notice was given. In this case the time was held to begin to run upon the day of the discovery of the death.³⁹

In the case of *Peele v. Provident Fund Soc.*, it appeared that the plaintiff's intestate, who held a life and accident insurance policy in the defendant company, died while taking a bath on the 17th day of December, 1894; that the plaintiff, his wife, was prostrated by the occurrence; that the coroner made an examination of the body and an investigation into the facts, the result of which plaintiff did not learn until December 28th; between these dates the condition of plaintiff was such that she was unable to transact any business; that on the second day of January, 1895, plaintiff forwarded to the defendant a notice of the accident. The court says: "The

³⁹ *Trippe v. Provident Fund Soc.*, 140 N. Y. 23, 22 L. R. A. 432; *Peele v. Provident Fund Soc.*, 147 Ind. 543; *McElroy v. John Hancock Mut. Life Ins. Co.*, 88 Md. 137, 41 Atl. 112; *Cooper v. United States Mut. Ben. Ass'n*, 132 N. Y. 334, 16 L. R. A. 138; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389; *Germania Fire Ins. Co. v. Curran*, 8 Kan. 9; *Simons v. Iowa State T. M. Ass'n*, 102 Iowa, 267, 71 N. W. 255; *Kentzler v. American Mut. Acc. Ass'n*, 88 Wis. 589, 60 N. W. 1002. See post, "Excuses for Noncompliance."

condition required that the notice should be given 'within ten days from the date of either injury or death' and also that it should contain 'full particulars of the accident and injury.' In the interpretation of conditions in policies of insurance, courts have looked to the intention and the substantial rights of the parties. * * * This is particularly true in case of the death of the assured. In the case of any insurance policy the one who takes out and pays for the policy may well be expected to know its conditions and to comply with them. But in the event of his death, the party suffering the loss is often at a disadvantage, both as to knowing the conditions and as to being able to comply with them according to the strict letter of their terms.⁴⁰ * * * In *Trippe v. Provident Fund Soc.*,^{40a} * * * the form of policy and notice being also identical, the court said: 'The condition upon which the defense is based was to operate upon the contract of insurance only subsequent to the fact of a loss. It must, therefore, receive a liberal and reasonable construction in favor of the beneficiaries under the contract. * * * The provision requires not only notice of the death, but 'full particulars of the accident and injury.' It is quite conceivable that in many cases of death by accident the fact cannot be and is not known until days or even weeks after it has occurred. Such conditions in a policy of insurance must be considered as inserted for some reasonable and practical purpose, and not with a view of defeating a recovery in case of loss by requiring the parties interested to do something manifestly impossible. The object of the notice was to enable the defendant, within a reasonable time after the death or injury, to inquire into all the facts and circumstances while they were fresh in the memory of witnesses, in order to determine

⁴⁰ 1 Am. & Eng. Enc. Law (2d Ed.), p. 323, and cases cited in notes.

^{40a} 140 N. Y. 23, 35 N. E. 316, 22 L. R. A. 432.

whether it was liable or not upon its contract. The full particulars of the death which the condition requires cannot ordinarily be furnished until the fact of death and the manner in which it occurred are ascertained. * * * The parties having contracted that the notice of death should be accompanied by full particulars of the manner in which it occurred, and the attendant circumstances, they evidently intended that it should be given only when the fact and manner of death became known to the parties who were required to act. The fair and reasonable construction of this condition, therefore, is that the ten days within which the notice is to be given did not begin to run from the date of the accident or the disappearance of the insured, but from the time when the body was found, and the important fact of death, with the circumstances and particulars under which it occurred, ascertained. * * * The plaintiff * * * was the only party * * * who could give the notice, and she could not give it within the meaning of the condition, until she had knowledge of the facts which she was bound to communicate. To hold that the plaintiff was bound to give notice of the death of her husband, with full particulars, before she had any knowledge of the facts, would be to require her, by a technical and literal construction, to do an impossible thing, which was not within the intention of the parties when the contract was made."⁴¹ And the provisions of a contract of insurance requiring notice of death within ten days after the occurrence of the accident, and making the same a condition precedent to the right of recovery upon the policy, have been held unreasonable and invalid as applied to a case where

⁴¹ Citing *Insurance Cos. v. Boykin*, 12 Wall. (U. S.) 433; *Paltrovitch v. Phoenix Ins. Co.*, 143 N. Y. 73, 25 L. R. A. 198; *May, Ins.* 217; *Hinman v. Hartford Fire Ins. Co.*, 36 Wis. 164; *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405.

death did not intervene until after ten days from the date of the accident.⁴²

The requirement of an accident policy that notice of an accident must be given within five days after it happens is complied with by giving a notice within five days after the insured learned that an accident was the cause of his illness and disability.⁴³

EXCUSES FOR NON-COMPLIANCE.

§ 169. Impossibility of performance of the conditions of a policy regarding the giving of notice or proof of loss is sometimes held to be sufficient excuse for non-performance.

The supreme court of Iowa in disposing of a case where the insured did not have and could not furnish certified copies of the bills and invoices of the goods destroyed as required by the policy, said: "We think she (insured) is not required by the provision (of the policy) to perform an impossible thing, and if it can be shown that without any fault or fraud on her part compliance is rendered impossible, she may recover without performing the conditions."⁴⁴ And if the insured was so insane as to be incapable of making an intelligent statement and proof of loss, this would of itself excuse compliance with that condition of the policy.⁴⁵

A provision in an accident insurance policy payable in case of death to legal representatives, making it the duty of

⁴² *Hoffman v. Manufacturers' Acc. Ind. Co.*, 56 Mo. App. 301. But see contra, *Kimball v. Masons' Fraternal Acc. Ass'n*, 90 Me. 183.

⁴³ *Phillips v. United States Benev. Soc.*, 120 Mich. 142, 79 N. W. 1.

⁴⁴ *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa, 308, 21 N. W. 652; *O'Brien v. Commercial Fire Ins. Co.*, 63 N. Y. 111; *Bumstead v. Dividend Mut. Ins. Co.*, 12 N. Y. 81. See, also, *Woody v. Old Dominion Ins. Co.*, 31 Grat. (Va.) 362.

⁴⁵ *Insurance Cos. v. Boykin*, 12 Wall. (U. S.) 433; *Matthews v. American Cent. Ins. Co.*, 154 N. Y. 449, 39 L. R. A. 433; *Buchanan v. Supreme Conclave, I. O. of H.*, 178 Pa. St. 465, 34 L. R. A. 436.

the claimant to give notice of injury within seven days of its occurrence, does not apply to the administratrix of the insured who did not take out letters of administration until thirty days after the injury.⁴⁶

Contra.

In other cases it has been held that only the act of God will excuse a non-compliance, and that failure to give notice and proof because of instantaneous death of the insured (no one else knowing of the existence of the policy) avoids the policy, where the giving of notice within a prescribed time is required—upon the ground that the failure was not due to the act of God and insured ought to have advised someone of the existence of the policy;⁴⁷ and the loss of the policy is no excuse for the failure to give notice within the prescribed time.⁴⁸

Burden of Proof in Case of Excuse for Non-compliance.

Where a policy requires the insured to do certain things, which he fails to do, the burden is on him to show that it was impossible for him to comply with the terms of the policy, by the use of all reasonable means within his power.⁴⁹

⁴⁶ *Globe Acc. Ins. Co. v. Gerisch*, 163 Ill. 625; *McElroy v. John Hancock Mut. Life Ins. Co.*, 88 Md. 137, 41 Atl. 112.

⁴⁷ *Gamble v. Accident Assur. Co.*, 4 Ir. R. C. L. 204; *Home Ins. Co. v. Lindsey*, 26 Ohio St. 348; *Joyce, Ins.* § 3278.

⁴⁸ *Blakeley v. Phoenix Ins. Co.*, 20 Wis. 217; *Prevost v. Scottish U. & N. Ins. Co.*, 14 Rap. Jud. Que. C. S. 203. On question of the possible effect of war on the giving of notice, see *Cohen v. New York Mut. Life Ins. Co.*, 50 N. Y. 610; *New York Life Ins. Co. v. Clopton*, 7 Bush (Ky.), 179; *Dillard v. Manhattan Life Ins. Co.*, 44 Ga. 119.

⁴⁹ *Scottish U. & N. Ins. Co. v. Keene*, 85 Md. 276; *Langan v. Royal Ins. Co.*, 162 Pa. St. 357.

CONDITIONS NOT REQUIRING STRICT COMPLIANCE.

§ 170. A policy will not be held to create conditions precedent to the right of action thereon, nor to provide for forfeiture in case of non-compliance, unless such a construction is necessary.

Other policies require the insured to furnish notice and proofs of loss at some time after the fire, death, or accident, and before suit, without definitely limiting the time for performance and without making compliance within a given time a condition precedent to the right to maintain an action. In such policies the provisions concerning the time of serving notice and proofs of loss are merely directory and not mandatory, and only create conditions precedent to a right to recover. Mere delay in furnishing notice or proofs does not avoid a policy or prevent recovery thereon unless such a result be clearly stipulated for, but it defers the time of payment. The stipulations requiring notice of loss are more strictly construed than those regulating the giving of proofs.⁵⁰ In *Carpenter v. German-American Ins. Co.*, the language of the policy was, "in case of loss the assured shall give immediate notice thereof, and shall render to the company a particular account of said loss under oath stating," etc. Here follows a specification of the facts required to be stated." Immediate notice of the loss was given and acknowledged. The court said: "No time being fixed within which the preliminary proofs shall be rendered, the contract will be construed to intend a reasonable time. * * * But what was the effect of failure on the part of the plaintiff to perform this stipulation of the contract? None is specified in the policy.

⁵⁰ *Carpenter v. German American Ins. Co.*, 52 Hun (N. Y.), 249; *Miller v. Hartford Fire Ins. Co.*, 70 Iowa, 704, 29 N. W. 411; *Rines v. German Ins. Co.*, 78 Minn. 46, 80 N. W. 840; *Kahnweiler v. Phoenix Ins. Co. of Brooklyn*, 57 Fed. 562. See ante, notes 8-10.

Performance of the stipulation is not in terms made a condition of liability on the part of the defendant, nor is a forfeiture of the policy attached to that stipulation as a penalty for its non-performance. * * * We think the delay in rendering those proofs did not of itself necessarily work a forfeiture of the policy or preclude a recovery by the plaintiffs." And a clause limiting the time for furnishing proofs of loss may be so qualified as not to render a strict compliance within the time specified a condition precedent to a right of action. Where the policy requires proofs of loss but does not prescribe any time within which they are to be furnished, they may be furnished within any reasonable time.⁵¹

Where a policy in terms requires immediate notice to be given but specifies no particular time within which proofs of loss may be furnished, further than that "the insured shall render to the company a particular account of said loss in writing under oath; until such proofs are produced the loss shall not be deemed proved or payable," and further providing that the loss is not payable until the expiration of sixty days from the time of furnishing proofs and that the insured shall have one year from the time of the loss in which to bring suit, the insured is only required to furnish proofs of loss within ten months after the loss.⁵² A condition that the insured must furnish preliminary proofs within thirty days after the fire and "if the claim of loss is for a building, shall procure a duly verified certificate of a builder as to the cash value of the building before the fire, which shall be attached to and form a part of such proofs * * * and shall be verified by the insured" does not compel the furnishing of

⁵¹ Cases *supra*.

⁵² *Niagara Fire Ins. Co. v. Scammon*, 100 Ill. 645; *Killips v. Putnam Fire Ins. Co.*, 28 Wis. 472.

the certificate within thirty days after the fire.⁵³ And where a policy provides under a distinct head from conditions avoiding it, that all proceedings after a loss shall be had according to provisions endorsed on the policy, which latter are to the effect that proofs of loss shall be furnished in thirty days and that a claim shall not be due or payable until sixty days after full completion and compliance with the requirements of the policy, and that no suit shall be commenced thereon more than six months after the occurrence of the fire, the failure to furnish proofs of loss within thirty days does not avoid the policy but merely postpones the time of its payment.⁵⁴ Under a Michigan standard policy a failure to furnish proofs of loss within the time mentioned therein is not fatal to a right of action.⁵⁵

And where the condition of a policy was that the person sustaining a loss or damage by fire should forthwith give notice in writing to the company and as soon as possible thereafter deliver an account of loss without expressly providing that a failure so to do should work a forfeiture, it has been held that proofs of loss furnished two months after the fire are in time.⁵⁶

Compliance with the terms of a policy as to proof of loss and time for bringing suit, is not necessary to recovery under

⁵³ *Summerfield v. Phoenix Assur. Co.*, 65 Fed. 292.

⁵⁴ *Hall v. Concordia Fire Ins. Co.*, 90 Mich. 403, 51 N. W. 524; *Vangindertaelen v. Phenix Ins. Co.*, 82 Wis. 112, 51 N. W. 1122; *Towne v. Springfield F. & M. Ins. Co.*, 145 Mass. 582; *Steele v. German Ins. Co.*, 93 Mich. 81, 18 L. R. A. 85, 53 N. W. 514; *Kenton Ins. Co. v. Downs*, 90 Ky. 236, 13 S. W. 882; *Tubbs v. Dwelling House Ins. Co.*, 84 Mich. 646; *Coventry Mut. Live Stock Ass'n v. Evans*, 102 Pa. St. 281.

⁵⁵ *Rynalski v. Insurance Co. of Pennsylvania*, 96 Mich. 395.

⁵⁶ *Sun Mut. Ins. Co. v. Mattingly*, 77 Tex. 162; *Killips v. Putnam Fire Ins. Co.*, 28 Wis. 472.

a statute making an agent for an unlicensed foreign company personally liable for the amount of the loss.⁵⁷

Where a policy provides that no suit shall be maintained until after the insured shall fully comply with the requirements of the policy nor unless suit is brought within a given time, proofs of loss may be furnished within a reasonable time after the fire though later than the time fixed by the policy, and if such proofs are accepted and retained by the insurer without objection any defect in time of service is waived.⁵⁸

Proofs given within a reasonable time are sufficient compliance with the terms of a policy requiring notice to be given within twenty-four hours after a fire occurred without fixing any penalty or forfeiture for failure so to do.⁵⁹

Proofs furnished on or before the day on which the loss is payable by the terms of a policy are sufficient where proofs are required, but no time for furnishing them is fixed, and any loss on the policy becomes due and payable at a given time after its occurrence.⁶⁰

A stipulation that the insured shall upon the happening of a fire forthwith "give notice of the loss and within thirty days render a particular account thereof and also produce a certificate, etc., does not require that the certificate be furnished within the thirty days.⁶¹

⁵⁷ Noble v. Mitchell, 100 Ala. 519, 25 L. R. A. 238, 164 U. S. 367.

⁵⁸ Rheims v. Standard Fire Ins. Co., 39 W. Va. 672. In this case the policy said: "Within thirty days after the fire, the assured shall render a * * * detailed statement of the loss * * * in writing. * * * No suit or action * * * for the recovery of any claim by virtue of this policy shall be sustainable * * * until after full compliance * * * with all the foregoing requirements, nor unless such suit * * * shall be commenced within six months next after the date of the fire."

⁵⁹ Coventry Mut. Live Stock Ass'n v. Evans, 102 Pa. St. 281.

⁶⁰ Johnson v. Dakota F. & M. Ins. Co., 1 N. D. 167, 45 N. W. 799.

⁶¹ Badger v. Glens Falls Ins. Co., 49 Wis. 389, 5 N. W. 845; Sum-

TIME TO FURNISH NOT DEFINITE.

§ 171. A requirement that notice or proofs must be furnished "immediately," or "forthwith," or "as soon as possible," etc., will be held to mean that they must be furnished with reasonable promptness and within a reasonable time, construing these terms in the light of all the facts and circumstances surrounding each case.

What is a reasonable time is sometimes a question of law, but usually a question of fact.

General Construction of Such Terms.

Many policies while making the furnishing of notice and proofs, or one of them, soon after loss or damage or accident a condition precedent to a right to recovery, have either failed to fix any time within which this must be done, or have designated that time only by using such vague and indefinite terms as "forthwith," "immediately," "as soon as possible," "early," "within a reasonable time," etc. Such terms are synonymous and incapable of absolute definition or limitation. They are elastic in their meaning and relative in their use and application. They all mean "within a reasonable time" under all the facts and circumstances of each case. What would be "a reasonable time" in one case might be unreasonable in another. But the giving of the notice or proof as required may nevertheless be a condition precedent, and if such it be, non-compliance by the insured, unless waived by the company, will defeat any recovery.⁶²

merfield v. Phoenix Assur. Co., 65 Fed. 292; Lane v. St. Paul F. & M. Ins. Co., 50 Minn. 227; Killips v. Putnam Fire Ins. Co., 28 Wis. 472.

⁶² Brown v. London Assur. Corp., 40 Hun (N. Y.), 101; Insurance Co. of North America v. Brim, 111 Ind. 281; Kingsley v. New England Mut. Fire Ins. Co., 8 Cush. (Mass.) 393; Edwards v. Baltimore Fire Ins. Co., 3 Gill (Md.), 176; St. Louis Ins. Co. v. Kyle, 11 Mo. 278; Rines v. German Ins. Co., 78 Minn. 46, 80 N. W. 839, and cases supra; Baker v. German Fire Ins. Co., 124 Ind. 490, 24 N. E. 1041; Carey v. Farmers' Ins. Co., 27 Or. 146, 40 Pac. 91.

In this connection the distinction between "notice" and "proof" of loss must not be overlooked. The functions of the two are different. "Notice" of a loss or death or accident should always be given with as little delay as the circumstances of a case will permit, so as to enable the insurer to act promptly and investigate while the occurrence is fresh in the minds of people, and before evidence which it might desire has been lost or destroyed; and to further enable it to take prompt and proper measures to protect its interest, and, in case of fire, to preserve property saved from further damage or loss; but the proof required for the purpose of facilitating an adjustment of a loss need not be presented so promptly. The clause concerning the furnishing of preliminary proofs is construed more liberally.

In a case recently decided by the supreme court of Minnesota the policy required that "a statement in writing signed and sworn to by the insured shall be forthwith rendered to the company setting forth the value of the property insured, the interest of the insured," etc. The proofs of loss were mailed to the defendant eighteen days, and received by it twenty-one days, after the fire. It was contended that the proofs were not furnished in time, that therefore plaintiff could not recover. The court said: "We cannot so hold. 'Forthwith' means 'with due diligence under the circumstances of the case and without unnecessary or unreasonable delay.' 2 May, Ins. § 462. There are cases holding that notice of loss given within less time than eighteen days after the fire is not given 'forthwith.' Id. But a notice of loss is a simple matter, while such a proof of loss as is required by the above quoted provision of the policy is not. It may take considerable time to prepare such a proof of loss, and may require the services of an attorney or some one skilled in the business. Under these cir-

circumstances we cannot hold that eighteen days after the fire is an unreasonable time in which to render the same."⁶³

Whether or not a party has used due diligence in giving notice or proof of loss, is sometimes a question of law for the court, and sometimes a question of fact for a jury to pass upon. Where the facts are not in dispute and the inferences are certain, and the sufficiency of an excuse for delay not involved, it is for the court to say whether or not the terms and conditions of the policy as to time have been complied with.⁶⁴

But upon a jury trial where such facts or circumstances are open for ascertainment of a jury, it should be left for them to determine as a question of fact. Extreme cases either way may be easily determined. Between them there is a wide stretch of debatable ground and cases falling within it are governed so much by the particular circumstances of each case, that it is much better to determine the matter as a question of fact.⁶⁵

⁶³ *Rines v. German Ins. Co.*, 78 Minn. 46, 80 N. W. 839; *Central City Ins. Co. v. Oates*, 86 Ala. 558; *Wightman v. Western M. & F. Ins. Co.*, 8 Rob. (La.) 442, 2 Bennett, Fire Ins. Cas. 330; *Edwards v. Baltimore Fire Ins. Co.*, 3 Gill (Md.), 176, 2 Bennett, Fire Ins. Cas. 405; *Trippe v. Provident Fund Soc.*, 140 N. Y. 23, 22 L. R. A. 432; *Peele v. Provident Fund Soc.*, 147 Ind. 543; *McElroy v. John Hancock Mut. Life Ins. Co.*, 88 Md. 137, 41 Atl. 112.

In *Wightman v. Western M. & F. Ins. Co.*, supra, the court said: "Although the policy stipulates that the notice shall be given 'forthwith,' we do not understand that to mean in an hour or in any other very brief space of time, but without unnecessary delay."

⁶⁴ *Dwelling House Ins. Co. v. Dowdall*, 159 Ill. 179; *Baker v. German Fire Ins. Co.*, 124 Ind. 490; *Brown v. London Assur. Corp.*, 40 Hun (N. Y.), 101; *Columbia Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507; *Kimball v. Howard Fire Ins. Co.*, 8 Gray (Mass.), 33; *Bennett v. Lycoming County Mut. Ins. Co.*, 67 N. Y. 274.

⁶⁵ *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553; *Donahue v. Windsor Co. Mut. Fire Ins. Co.*, 56 Vt. 374; *Edwards v. Baltimore Fire Ins. Co.*, 3 Gill (Md.), 176; *O'Brien v. Phoenix Ins. Co.*, 76 N. Y. 459; *McFarland v. United States Mut. Acc. Ass'n*, 124 Mo. 204.

The supreme court of Indiana says of this question: "The purpose of the notice is to enable the company to take proper precautions for its own protection. The notice must be reasonable under all the circumstances. Where the facts are not in dispute or where they have been ascertained by the proper tribunal for that purpose, it becomes a question of law for the court to determine whether, under the facts and circumstances of a given case, the notice was reasonable. Where the facts tending to show an excuse for the delay are in dispute or where it is a disputed question whether the delay was occasioned by certain facts, it is for the jury to ascertain the facts and the cause and effect of the delay, and, under proper instructions from the court as to the force and effect of the facts found, determine whether or not under all the circumstances reasonable notice of the loss was given."⁶⁶

The supreme court of Indiana says of this question: "The question of what is a reasonable time is a question of law for the court in two classes of cases, viz: (1) 'Commercial transactions which happen in the same way day by day, and present the question of reasonable time on the same data in continually recurring instances, so that by a series of decisions of the courts the reasonable time has been rendered certain; * * * (2) where the time taken is so clearly reasonable or unreasonable that there can be no room for doubt as to the proper answer to the question. Where, however, the answer to the question is one dependent on many different circumstances, which do not constantly recur in other cases of like character, and with respect to which no certain rule of law has heretofore been laid down, or could be laid down, the question is one of fact for the jury."⁶⁷

⁶⁶ Insurance Co. of North America v. Brim, 111 Ind. 281; Wood. Fire Ins. § 414.

⁶⁷ Hamilton v. Phoenix Ins. Co. of Hartford (C. C. A.), 61 Fed. 379.

Proofs of loss are furnished "in due time" if they arrive at the postoffice in the city where the main office of the company is located in time for it to receive them within the time limited, although it did not call for nor receive them until the next day.⁶⁸

Proofs mailed by a receiver of a national bank on June 24, of a loss by fraud of the cashier discovered the latter part of May, are made "as soon as practicable" within the meaning of a cashier's bond where notice in writing was given to the surety company as soon as the loss was discovered with a request for blanks to make proofs of loss upon and such blanks were mailed by the surety company on May 31.⁶⁹

If the policy does not specify any time within which the proofs must be furnished a reasonable time will be allowed.⁷⁰

Under the provisions of a policy requiring "early notice" of any damage to be given to the insurer, a notice of an injury to grain in transportation given on the Monday or Tuesday following the Saturday on which the damage was discovered while the grain was being unloaded is served in time, where the policy continues in force until the grain "shall be safely landed at point of destination."⁷¹

Where a policy required that notice of loss should be given within twenty-four hours after it occurred, but provided no penalty or forfeiture for non-compliance, it is sufficient to give notice within a reasonable time after insured knew of the

⁶⁸ *Caldwell v. Dwelling House Ins. Co.*, 61 Mo. App. 4.

⁶⁹ *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. Ed. 977; *Konrad v. Union Casualty & Surety Co.*, 49 La. Ann. 636; *California Sav. Bank of San Diego v. American Surety Co.*, 87 Fed. 119; *American Credit Ind. Co. v. Wood*, 38 U. S. App. 585, 19 C. C. A. 273.

⁷⁰ *Miller v. Hartford Fire Ins. Co.*, 70 Iowa, 704; *Springfield F. & M. Ins. Co. v. Brown*, 128 Pa. St. 392, 18 Atl. 396.

⁷¹ *Rodee v. Detroit F. & M. Ins. Co.*, 74 Hun (N. Y.), 146.

loss.⁷² Where the insured immediately upon the happening of a fire applied to an agent of the insurer for blank proofs of loss and the latter sent to the company for the same and upon their receipt delivered them to the insured, who thereupon promptly prepared and sent proper proofs to the company which received them without objection, it is a question for a jury whether there is a reasonable explanation of the delay beyond the thirty days specified in the policy.⁷³ And where the insurer fails and refuses to issue a policy it waives its right to object to the lateness of a notice sent eleven months after a loss.⁷⁴

A benevolent society, whose constitution expressly reserves to the society the right to expend the money which it agrees to pay on the death of the wife of a member towards the burial, is not liable, where it is not notified of the death of the wife until after the funeral.⁷⁵

Reasonable Time.

Notice of the death of one who carried life and accident insurance is given within a reasonable, though not within the time limited in the policy, when it is given within sixteen days after the death and within five days after the beneficiary first learns that the death was accidental, even though the policy specifically requires the furnishing of notice within ten days from the date of death—especially when the general

⁷² *Coventry Mut. Live Stock Ins. Ass'n v. Evans*, 102 Pa. St. 281.

⁷³ *American Cent. Ins. Co. v. Haws* (Pa.), 11 Atl. 107.

⁷⁴ *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390; *Baile v. St. Joseph F. & M. Ins. Co.*, 73 Mo. 387; *Walker v. Continental Ins. Co.*, 2 Utah, 335.

⁷⁵ *Talbot v. Tipperary Men N., S. & B. Ass'n*, 23 Misc. Rep. 486, 52 N. Y. Supp. 633.

agent of the insurer was immediately apprised of the death by newspaper accounts.⁷⁶

The visit of an adjuster of the insurer to the scene of a fire the day after a loss and his assurance to the insured that no notice or proof of loss need be furnished is sufficient excuse for failure to give notice or proof of loss within fifty days after a fire, under a policy requiring notice to be given within a reasonable time.⁷⁷

The Indiana statute (Rev. St. 1881, § 3770) makes void any requirement of an insurance policy that notice of loss must be given forthwith or within less than five days, and requires of the insured only reasonable diligence in the giving of the notice. Under this statute, notice given within fifteen days is given within a reasonable time.⁷⁸ A delay of fifty-three days in giving notice of loss to the insurer cannot, as a matter of law, be held unreasonable, where the policy was in a safe in the destroyed building; and owing to the confusion existing among the papers in the safe when it was opened, the policy was misplaced and the insured did not know and was unable to obtain information respecting the identity of the insurer, and gave notice as soon as he found the policy.⁷⁹ An unexplained delay of fifty days has been held unreasonable.⁸⁰ And four months.⁸¹ And eleven days.^{81a} Under exceptional

⁷⁶ *Peele v. Provident Fund Soc.*, 147 Ind. 543, 44 N. E. 661; *Trippe v. Provident Fund Soc.*, 140 N. Y. 23, 22 L. R. A. 432.

⁷⁷ *Phenix Ins. Co. v. Pickel*, 3 Ind. App. 332, 29 N. E. 432.

⁷⁸ *Germania Fire Ins. Co. v. Deckard*, 3 Ind. App. 361, 28 N. E. 868.

⁷⁹ 160 N. Y. 595, 46 L. R. A. 682, 28 App. Div. 213, 50 N. Y. Supp. 922. See *Oakland Home Ins. Co. v. Davis* (Tex. Civ. App.), 33 S. W. 587; *Konrad v. Union Casualty & Surety Co.*, 49 La. Ann. 636.

⁸⁰ *Pickel v. Phenix Ins. Co.*, 119 Ind. 291.

⁸¹ *McEvers v. Lawrence*, 1 Hoff. Ch. (N. Y.) 171.

^{81a} *Trask v. State F. & M. Ins. Co.*, 29 Pa. St. 198.

circumstances a delay of six months may not be unreasonable.⁸²

Forthwith.

A requirement in a policy that notice of loss must be given forthwith is substantially equivalent to a requirement that it be given within a reasonable time.⁸³ It is construed liberally in favor of the insured.⁸⁴ The use of a phrase requiring the insured to "forthwith give notice of loss" imposes upon the insured nothing more than due diligence under all the circumstances of the case. In ordinary cases, whether or not due diligence has been used by the insured or whether he has been guilty of procrastination or delay is usually considered a question of fact to be determined by the jury.⁸⁵ So where a fire occurred on Friday, it was left for the jury to say whether a notice furnished the following Wednesday was served in proper time.⁸⁶ And under various circumstances twelve days has been held a reasonable time within which to furnish notice of loss under a policy requiring notice to be given

⁸² *Swan v. Liverpool, L. & G. Ins. Co.*, 52 Miss. 704.

Where proofs were forwarded within thirty days, it was held that the delay was not so unreasonable as to preclude the submission to the jury of the question whether the policy had been complied with. *Ben Franklin Fire Ins. Co. v. Flynn*, 98 Pa. St. 627. See, also, *Brink v. Hanover Fire Ins. Co.*, 80 N. Y. 108; *Provident Life Ins. & Inv. Co. v. Baumm*, 29 Ind. 236.

⁸³ *Pennypacker v. Capital Ins. Co.*, 80 Iowa, 56, 45 N. W. 408.

⁸⁴ *Central City Ins. Co. v. Oates*, 86 Ala. 559.

⁸⁵ *Edwards v. Baltimore Fire Ins. Co.*, 3 Gill (Md.), 176, 2 Bennett, Fire Ins. Cas. 405; *Donahue v. Windsor Co. Mut. Fire Ins. Co.*, 56 Vt. 374; *Phillips v. Protection Ins. Co.*, 14 Mo. 220, 3 Bennett, Fire Ins. Cas. 204; *Springfield F. & M. Ins. Co. v. Brown*, 128 Pa. St. 392; *Roumage v. Mechanics' Fire Ins. Co.*, 13 N. J. Law, 110; *Continental Ins. Co. v. Lippold*, 3 Neb. 391, 5 Bennett, Fire Ins. Cas. 562.

⁸⁶ *Inman v. Western Fire Ins. Co.*, 12 Wend. (N. Y.) 461; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278, 2 Bennett, Fire Ins. Cas. 641; *Pennypacker v. Capital Ins. Co.*, 80 Iowa, 56, 45 N. W. 408.

forthwith;⁸⁷ and twenty-three days;⁸⁸ and twenty-six days;⁸⁹ and four days;⁹⁰ and six days;⁹¹ and eight days.⁹² In *Bennett v. Lycoming County Mut. Ins. Co.*,^{92a} a policy required that the insured should forthwith give notice to the secretary of the company. Soon after the policy issued, the insured delivered it to the agent of the company for an indorsement of its consent to some alterations in the policy. The company kept and cancelled the policy without notifying the insured. A day after the loss notice was given to defendant's local agents and its general agent soon afterwards visited the location of the property and interviewed the insured about the loss. The policy being out of plaintiff's possession he was not aware of the notice required. Upon learning the condition of the policy he furnished proper notice upon the 26th day after the loss. This was held to be in time. Proofs furnished two months after the fire have been, under exceptional circumstances, held to be furnished forthwith;⁹³ and one hundred and fifteen days;⁹⁴ and ninety days.⁹⁵

Not Forthwith.

Where a policy required notice to be given forthwith, a notice served thirty-nine days after the loss occurred has been

⁸⁷ *Capitol Ins. Co. v. Wallace*, 48 Kan. 400, 29 Pac. 755.

⁸⁸ *Donahue v. Windsor Co. Mut. Fire Ins. Co.*, 56 Vt. 374.

⁸⁹ *Bennett v. Lycoming Co. Mut. Ins. Co.*, 67 N. Y. 274.

⁹⁰ *Griffey v. New York Cent. Ins. Co.*, 100 N. Y. 417.

⁹¹ *Peppit v. North British & M. Ins. Co.*, 1 Russ. & G. (N. Scotia) 219.

⁹² *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 20 Barb. (N. Y.) 468.

^{92a} 67 N. Y. 274.

⁹³ *Harden v. Milwaukee Mechanics' Ins. Co.*, 164 Mass. 382, 25 Ins. Law J. 124.

⁹⁴ *Carpenter v. German American Ins. Co.*, 135 N. Y. 298.

⁹⁵ *Home Ins. Co. v. Davis*, 98 Pa. St. 280.

held to be too late;⁹⁶ and seventeen days has been held too late;⁹⁷ and eleven days;⁹⁸ and thirty-eight days;⁹⁹ and four months;¹⁰⁰ and three and one-half months;¹⁰¹ and eighteen days;¹⁰² and five months.¹⁰³

Immediate Notice.

Where a policy requires immediate notice of loss and fixes no prescribed time within which they must be served, proofs may be furnished within a reasonable time. A statute providing that proofs of loss furnished within twenty days shall be sufficient, is intended for the protection of the insured and does not compel the furnishing of proofs within that time. What is a reasonable time is to be ascertained from all the facts and circumstances of the case in the light of all the evidence as to the conduct of the insurer and the insured, of their negotiations and all that passed between them respecting the loss and the time and manner of proving it. Where the facts and circumstances are not clearly established and the evidence as to them is conflicting, the question is for the jury under proper instructions of the court.¹⁰⁴

⁹⁶ *McDermott v. Lycoming Fire Ins. Co.*, 12 Jones & S. (N. Y.) 221.

⁹⁷ *Brown v. London Assur. Corp.*, 40 Hun (N. Y.), 101.

⁹⁸ *Trask v. State F. & M. Ins. Co.*, 29 Pa. St. 198.

⁹⁹ *Inman v. Western Fire Ins. Co.*, 12 Wend. (N. Y.) 452, 1 Bennett, Fire Ins. Cas. 457.

¹⁰⁰ *McEvers v. Lawrence*, 1 Hoff. Ch. (N. Y.) 172, 1 Bennett, Fire Ins. Cas. 467.

¹⁰¹ *Baker v. German Fire Ins. Co.*, 124 Ind. 490, 24 N. E. 1041.

¹⁰² *Edwards v. Lycoming Co. Mut. Ins. Co.*, 75 Pa. St. 378.

¹⁰³ *Sherwood v. Agricultural Ins. Co.*, 10 Hun (N. Y.), 593.

¹⁰⁴ *Springfield F. & M. Ins. Co. v. Brown*, 128 Pa. St. 392; *Continental Ins. Co. v. Lippold*, 3 Neb. 391, 5 Bennett, Fire Ins. Cas. 562; *McFarland v. United States Mut. Acc. Ass'n*, 124 Mo. 204, 27 S. W. 436; *North Pennsylvania Fire Ins. Co. v. Susquehanna Mut. Fire Ins. Co.*, 2 Pears. (Pa.) 291; *Lockwood v. Middlesex Mut.*

A notice mailed to the insurer October 1st of a claim of the loss of an eye from an accident occurring September 1st, is given within a reasonable time where it appears that at the time of the accident the insured did not regard it as dangerous and was not convinced that he would lose his eye until sometime after sending the notice.¹⁰⁵ The conditions of an accident policy insuring against total disability or death, and requiring immediate proof to be given the insurer of any injury as well as of death resulting therefrom, are complied with by a proof served within a reasonable time after the death of the insured where no claim is made for disability.¹⁰⁶

Where a policy of accident insurance provides that in case of death or injury, notice of claim should be given to the secretary of the company "with full particulars of the accident and injury immediately after the accident occurs," and that "positive proofs of death" must be furnished within six months of the date of the accident, and the insured disappeared November 9th, 1892, but the facts concerning his death which occurred on that date were not known, nor was his body discovered till April 19th, 1893, the furnishing of notice of death on May 26th and proofs July 12th following, show a reasonable compliance with the terms of the policy.¹⁰⁷

Assur. Co., 47 Conn. 553; *Carey v. Farmers' Ins. Co.*, 27 Or. 147, 40 Pac. 91; *Lyon v. Railway Passenger Assur. Co.*, 46 Iowa, 631.

Service of notice of loss without unnecessary delay is a sufficient compliance with the requirement of a policy of insurance that the insured shall give "immediate" notice of loss. *Solomon v. Continental Fire Ins. Co.*, 160 N. Y. 595, 46 L. R. A. 682.

¹⁰⁵ *People's Acc. Ass'n v. Smith*, 126 Pa. St. 317, 17 Atl. 605.

¹⁰⁶ *McFarland v. United States Mut. Acc. Ass'n*, 124 Mo. 204, 27 S. W. 436. But see *Foster v. Fidelity & Casualty Co.*, 99 Wis. 449, 75 N. W. 69; *Underwood Veneer Co. v. London G. & A. Co.*, 100 Wis. 378, 75 N. W. 996.

¹⁰⁷ *Kentzler v. American Mut. Acc. Ass'n*, 88 Wis. 589, 60 N. W. 1002, 43 Am. St. Rep. 934; *Konrad v. Union Casualty & Surety Co.*, 49 La. Ann. 636.

No notice of an accident or injury causing death need be given by the beneficiary until the death occurs where the policy provides for immediate notice in the event of any accident or injury for which claim shall be made, "or in case of death resulting therefrom," as this provides for two notices of different claims, one for injury not resulting in death and the other of death.¹⁰⁸

A provision in a policy of indemnity against liability of the insured for injuries resulting from accidents caused by horses and vehicles used in his business of transporting merchandise, that the insured shall "upon the occurrence of an accident, and also upon information of a claim on account of an accident give immediate notice in writing" of such accident or claim, does not require the insured to give notice of an accident caused by one of his drivers, until he has actual notice thereof. He is not chargeable with the knowledge possessed by the driver at and after the accident, because the driver is in no sense his agent for the purpose of giving notice to the insurer.¹⁰⁹

Notice of the death of the insured in an accident policy providing for immediate notice of death is sufficient if given immediately after the beneficiary discovers the existence of the policy, though she does not make such discovery till nearly two months after the death of the insured.¹¹⁰

¹⁰⁸ *Western C. T. Ass'n v. Smith*, 56 U. S. App. 393, 85 Fed. 401, 40 L. R. A. 653.

¹⁰⁹ *Mandell v. Fidelity & Casualty Co.*, 170 Mass. 173, 49 N. E. 110; *Anoka Lumber Co. v. Fidelity & Casualty Co.*, 63 Minn. 286, 30 L. R. A. 689. See contra, *Foster v. Fidelity & Casualty Co.*, 99 Wis. 449, 75 N. W. 69, and *Underwood Veneer Co. v. London G. & A. Co.*, 100 Wis. 378, 75 N. W. 996.

¹¹⁰ *Konrad v. Union Casualty & Surety Co.*, 49 La. Ann. 636, 21 So. 721, 26 Ins. Law J. 536; *American Acc. Co. v. Card*, 13 Ohio C. C. 154; *Kentzler v. American Mut. Acc. Ass'n*, 88 Wis. 589, 60 N. W.

Under an employer's liability insurance policy providing that the assured on occurrence of an accident and on notice of claim on account thereof should give an immediate notice of such accident or claim to the company, assured need give but one notice and that within a reasonable time after claim is made on account of an accident.¹¹¹ So under the varying circumstances and evidence of each case, the provisions of a policy requiring immediate notice have been held complied with by giving notice in four days after a fire;¹¹² and one day;¹¹³ and ten days;¹¹⁴ and thirty-four days;¹¹⁵ and twenty-two days;¹¹⁶ and eighteen days;¹¹⁷ and five days.¹¹⁸

Not Immediate.

An unexcused and unexplained delay of fourteen days in furnishing proofs of loss is not a compliance with the terms of a policy requiring immediate notice of a loss;¹¹⁹ nor is such

1002; *Peele v. Provident Fund Soc.*, 147 Ind. 543; *Coventry Mut. Live Stock Ins. Ass'n v. Evans*, 102 Pa. St. 281, and cases supra.

¹¹¹ *Anoka Lumber Co. v. Fidelity & Casualty Co.*, 63 Minn. 286, 30 L. R. A. 689. See *Mandell v. Fidelity & Casualty Co.*, 170 Mass. 173, 49 N. E. 110; *Foster v. Fidelity & Casualty Co.*, 99 Wis. 449, 75 N. W. 69; and *Underwood Veneer Co. v. London G. & A. Co.*, 100 Wis. 378, 75 N. W. 996.

¹¹² *Hoffecker v. New Castle Co. Mut. Ins. Co.*, 5 Houst. (Del.) 101.

¹¹³ *Hartford Fire Ins. Co. v. Smith*, 3 Colo. 422.

¹¹⁴ *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389; *McFarland v. United States Mut. Acc. Ass'n*, 124 Mo. 204, 27 S. W. 436.

¹¹⁵ *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Knickerbocker Ins. Co. v. McGinnis*, 87 Ill. 70.

¹¹⁶ *Niagara Fire Ins. Co. v. Scammon*, 100 Ill. 644; *Killips v. Putnam Fire Ins. Co.*, 28 Wis. 472.

¹¹⁷ *Woody v. Old Dominion Ins. Co.*, 31 Grat. (Va.) 362.

¹¹⁸ *Schenck v. Mercer Co. Mut. Fire Ins. Co.*, 24 N. J. Law, 447, 3 Bennett, Fire Ins. Cas. 712; *Hovey v. American Mut. Ins. Co.*, 2 Duer (N. Y.), 554.

¹¹⁹ *La Force v. Williams City Fire Ins. Co.*, 43 Mo. App. 518.

delay for thirty-three days;¹²⁰ nor nineteen days;¹²¹ nor eleven days;¹²² nor sixty days;¹²³ nor twenty-nine days;¹²⁴ nor seventeen days;¹²⁵ nor six days where an injury for which claim was made happened in the city where the policy was issued and where the insurer had a resident agent and no excuse was shown for the delay.¹²⁶

As Soon as Possible, Due Notice, etc.

Under a policy providing that "all persons assured by this company and sustaining loss or damage by fire are forthwith to give notice thereof to the company and as soon as possible to deliver in a particular account of such loss or damage," where notice of loss is given immediately, a delay of nineteen days in furnishing a particular account of loss is not unreasonable.¹²⁷

¹²⁰ *Quinlan v. Providence W. Ins. Co.*, 133 N. Y. 357.

¹²¹ *Weed v. Hamburg-Bremen Fire Ins. Co.*, 133 N. Y. 394.

¹²² *Trask v. State F. & M. Ins. Co.*, 29 Pa. St. 198.

¹²³ *Ermentrout v. Girard F. & M. Ins. Co.*, 63 Minn. 305, 30 L. R. A. 346.

¹²⁴ *Foster v. Fidelity & Casualty Co.*, 99 Wis. 447, 40 L. R. A. 833, 75 N. W. 69.

¹²⁵ *Burnham v. Royal Ins. Co.*, 75 Mo. App. 394, 27 Ins. Law J. 928.

¹²⁶ *Railway Passenger Assur. Co. v. Burwell*, 44 Ind. 460.

¹²⁷ *Wightman v. Western M. & F. Ins. Co.*, 8 Rob. (La.) 442; *Home Ins. Co. v. Davis*, 98 Pa. St. 280 (90 days); *Carpenter v. German American Ins. Co.*, 135 N. Y. 298 (115 days); *Harnden v. Milwaukee Mechanics' Ins. Co.*, 164 Mass. 382, 25 Ins. Law J. 124 (two months); *Central City Ins. Co. v. Oates*, 86 Ala. 558; *Palmer v. St. Paul F. & M. Ins. Co.*, 44 Wis. 201 (four months held not unreasonable); *Edwards v. Baltimore Fire Ins. Co.*, 3 Gill (Md.), 176, 2 Bennett, Fire Ins. Cas. 405.

In *Home Ins. Co. v. Davis*, *supra*, insured was required, as soon as possible after loss, to tender a particular account. The preliminary notice was given, and a month later a special agent inspected the ruins, and obtained from the insured a statement of his loss under oath. A month afterward, at the instance of the company, criminal proceedings were begun against him on the charge of hav-

In an action upon a life policy which required notice of death to be given to the company or its agent "as soon thereafter as possible," it was proved that the insured died at a place from which notice of the death could be sent to the company in one day. It was further proved that the policy was in the trunk of A. in the city where the company's office was located, and that the party to whom the insurance was to be paid never had possession of and never saw the policy until eight or ten days after the death of the insured, when he immediately notified the company of the death. The company then handed him a blank affidavit in regard to the death, and stated that it would be sufficient if he returned the same within three or four weeks, which he did. The court held, that the company received notice within a reasonable time, and said: "The agreement on the part of the assured, that in the event of his death, his legal representatives should, as soon as possible thereafter, give notice in writing to the company, must have a reasonable construction. Thus, the law in this state does not authorize letters of

ing caused the fire. These resulted in favor of the insured. Three months after loss, proofs were forwarded. These were returned as unsatisfactory, and proper blanks were sent, which he was requested to fill out and transmit. He complied, and received notice of the receipt of the corrected proofs. Held, that the proofs were made as soon as possible after the loss. Three judges dissented.

And see *McPike v. Western Assur. Co.*, 61 Miss. 37 (where two months was held an unreasonable time). See, also, for similar conditions, *Brink v. Hanover Fire Ins. Co.*, 80 N. Y. 108; *Scammon v. Germania Ins. Co.*, 101 Ill. 621; *Provident Life Ins. & Inv. Co. v. Baum*, 29 Ind. 236; *Cornell v. Le Roy*, 9 Wend. (N. Y.) 163; *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751; *Jackson v. Southern Mut. Life Ins. Co.*, 36 Ga. 429; *Davis v. Davis*, 49 Me. 282; *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. Ed. 977; *Konrad v. Union Casualty & Surety Co.*, 49 La. Ann. 636; *Rodee v. Detroit F. & M. Ins. Co.*, 74 Hun (N. Y.), 146; *American Credit Ind. Co. v. Wood*, 38 U. S. App. 585, 19 C. C. A. 273; *California Sav. Bank of San Diego v. American Surety Co.*, 87 Fed. 119.

administration to issue until fifteen days after the death of an intestate, and it can hardly be insisted that a notice given in this state within that time is unreasonably delayed. The law as stated in Angell on Fire and Life Insurance, is that 'there must be no unnecessary delay, nothing which the law calls *laches*.' Section 230. * * * 'The terms "forthwith" * * * and "as soon as possible," are not to be taken literally, but mean with due diligence, or without unnecessary procrastination or delay, under all the circumstances of the case.'¹²⁸

FORM AND CONTENTS.

§ 172. A substantial compliance with the requirements of a policy as to the form and contents of the notice and proofs of loss is sufficient, unless other and further information is demanded.

General Rule.

No particular form or kind of notice or proof can be insisted upon by the insurer unless according to the stipulations of the policy. The form of the notice is usually immaterial if it states the facts required to be made known. If knowledge of the fire or accident or death be in fact communicated to the insurer, the courts will not be particular as to the form in which it is done nor by whom or how notice is given. A verbal notice is sufficient if no other be stipulated for. Neither notice nor proofs need contain more than is specifically required.¹²⁹ But if the policy be clear and explicit in its

¹²⁸ Provident Life Ins. & Inv. Co. v. Baum, 29 Ind. 236.

¹²⁹ Killips v. Putnam Fire Ins. Co., 28 Wis. 472; Erwin v. Springfield F. & M. Ins. Co., 24 Mo. App. 145; State Ins. Co. v. Maackens, 38 N. J. Law, 564; Roumage v. Mechanics' Fire Ins. Co., 13 N. J. Law, 110; Walker v. Metropolitan Ins. Co., 56 Me. 371; Good v. Georgia Home Ins. Co., 92 Va. 392, 23 S. E. 744; Georgia Home Ins. Co. v. Goode, 95 Va. 751, 30 S. E. 366; McFarland v. United States Mut.

requirements either as to form, or contents, or nature of notice or proof, full and complete compliance with all the conditions is necessary unless waived by the insurer.¹³⁰ Thus, under a

Acc. Ass'n, 124 Mo. 204, 27 S. W. 436; *Rix v. Mutual Ins. Co.*, 20 N. H. 198; *Buffalo L., T. & S. Deposit Co. v. Knights Templar & M. Mut. Aid Ass'n*, 126 N. Y. 450; *Braker v. Connecticut Ind. Ass'n*, 27 App. Div. 234, 50 N. Y. Supp. 547; *Walsh v. Washington Marine Ins. Co.*, 32 N. Y. 427; *O'Reilly v. Guardian Mut. Life Ins. Co.*, 60 N. Y. 169; *Miller v. Hartford Fire Ins. Co.*, 70 Iowa, 704, 29 N. W. 412; *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419, 34 Pac. 1059; *Northwestern Ins. Co. v. Atkins*, 3 Bush (Ky.), 333; *Hibernia Mut. Fire Ins. Co. v. Meyer*, 39 N. J. Law, 482.

In *Norton v. Rensselaer & S. Ins. Co.*, 7 Cow. (N. Y.) 645, 1 Bennett, Fire Ins. Cas. 204, the court said: "Undoubtedly, these [the notice and certificate] must be furnished, according to the policy, a certain number or days before an action can be brought; but it is another question what they should contain. The clause requiring proof of loss in marine policies has been construed with considerable liberality. The court have looked to circumstances and required no more information of the party than what appeared to be within his control. In *Lawrence v. Ocean Ins. Co.*, 11 Johns. (N. Y.) 260, Thompson, J., in delivering the opinion of the court, says the clause 'requires only reasonable information to be given to the underwriters; so that they can be enabled to form some estimate of their rights and duties before they are obliged to pay. This clause has always been liberally expounded, and is construed to require only the best evidence of the fact which the party possesses at the time.' * * * The clause itself in the policy before us expressly contemplates the latitude arising from circumstances."

In *Martin v. Manufacturers' Acc. Ind. Co.*, 151 N. Y. 95, the policy required immediate notice to be given, containing specific particulars, and provided that failure to give such immediate notice shall invalidate all claims. The court held that the forfeiture clause applied only to the time, and not to the form of notice, and said: "It would be a very harsh and unreasonable construction to apply this [forfeiture] clause to every imperfection in a notice which, although promptly given, omitted to state some particular. * * * The company could have demanded further particulars, but having omitted to do so, it waived any objection to the form or contents of the notice."

¹³⁰ *Welsh v. Des Moines Ins. Co.*, 71 Iowa, 337, 32 N. W. 369; *Brock v. Des Moines Ins. Co.*, 96 Iowa, 39, 64 N. W. 685; *Heusingveld v.*

policy providing that in case of loss insured should state under oath that the property was contained in the building or premises described in the policy, the neglect to make such statement has been held to defeat a recovery.¹³¹ When no question of waiver is involved, the sufficiency of proofs must be determined as a matter of law by the court.¹³² All the insurer can ask for in proofs is definite, unequivocal information, and a compliance with the conditions designed to protect it from fraud and imposition. The form in which they are made cannot be regarded as important.¹³³ Proofs need contain only what is specifically required by the terms of the policy. A statement of any other facts is surplusage and a misrecital concerning the same is immaterial.¹³⁴ They are

St. Paul F. & M. Ins. Co., 96 Iowa, 224, 64 N. W. 769; Langan v. Royal Ins. Co., 162 Pa. St. 357; Jones v. Mechanics' Fire Ins. Co., 36 N. J. Law, 29; Nixon v. Queen Ins. Co., 23 Can. Sup. Ct. 26; Shawmut Sugar Refining Co. v. Peoples' Mut. Fire Ins. Co., 12 Gray (Mass.), 535; Simons v. Iowa State T. M. Ass'n, 102 Iowa, 267, 71 N. W. 254; O'Reilly v. Guardian Mut. Life Ins. Co., 60 N. Y. 173; Heywood v. Maine Mut. Acc. Ass'n, 85 Me. 289; Daniels v. Equitable Fire Ins. Co., 50 Conn. 551; Fink v. Lancashire Ins. Co., 60 Mo. App. 673; Hartford Fire Ins. Co. v. Smith, 3 Colo. 422; Summerfield v. Phoenix Assur. Co., 65 Fed. 292; Connell v. Milwaukee Mut. Fire Ins. Co., 18 Wis. 387; Wellcome v. Peoples' Equitable Mut. Fire Ins. Co., 2 Gray (Mass.), 481; Stephenson v. Bankers' Life Ass'n, 108 Iowa, 637, 79 N. W. 461.

¹³¹ Harris v. Royal Canadian Ins. Co., 53 Iowa, 236.

¹³² Gauche v. London & L. Ins. Co., 10 Fed. 347.

¹³³ Erwin v. Springfield F. & M. Ins. Co., 24 Mo. App. 145. In this case it was held that a condition which provides for a statement as to other insurance, if any, and the giving of the written portions of the policy, does not require an affirmative averment that there was no other insurance, for such would be the presumption. See, also, Hincley v. Germania Fire Ins. Co., 140 Mass. 38; Clement v. British American Assur. Co., 141 Mass. 298; Taylor v. Aetna Ins. Co., 120 Mass. 254; Fowle v. Springfield F. & M. Ins. Co., 122 Mass. 191; Smith v. Commonwealth Ins. Co., 49 Wis. 322; Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232.

¹³⁴ Walker v. Metropolitan Ins. Co., 56 Me. 371; Rix v. Mutual Ins.

sufficient if they show on their face an honest effort on the part of the insured to comply with the requirements of the policy.¹³⁵ Where the insured furnishes two accounts of loss and two certificates of a magistrate, these are to be construed together in determining what proofs of loss are served.¹³⁶

The affidavit, whether of an insane man or not, is sufficient as to the information which it conveys of the time and nature of the amount of the loss covered by the policy.¹³⁷ A verbal notice of loss given by the insured to the local agent of the insurer, and by the latter at the request of the former communicated in writing to the company, is a sufficient compliance with the terms of the policy requiring notice to be given to the insurer in writing at its home office, without specifying the form or contents of the notice, where the insurer makes no objection on account of the form of the notice thus given and makes no demand for other and further proof.¹³⁸

Co., 20 N. H. 198; *Walsh v. Washington Marine Ins. Co.*, 32 N. Y. 427; *O'Reilly v. Guardian Mut. Life Ins. Co.*, 60 N. Y. 169; *Miller v. Hartford Fire Ins. Co.*, 70 Iowa, 704, 29 N. W. 412.

¹³⁵ *Home Fire Ins. Co. v. Hammang*, 44 Neb. 566, 62 N. W. 883; *Wyman v. Peoples' Equity Ins. Co.*, 1 Allen (Mass.), 301; *Harkins v. Quincy Mut. Fire Ins. Co.*, 16 Gray (Mass.), 591; *Boyle v. Hamburg-Bremen Fire Ins. Co.*, 169 Pa. St. 349.

¹³⁶ *Brown v. Hartford Fire Ins. Co.*, 52 Hun (N. Y.), 260; *Parks v. Anchor Mut. Fire Ins. Co.*, 106 Iowa, 402, 76 N. W. 743.

¹³⁷ *Germania Fire Ins. Co. v. Boykin*, 12 Wall. (U. S.) 433, 20 L. Ed. 442.

¹³⁸ *Phenix Ins. Co. v. Rad Bila Hora Lodge*, 41 Neb. 21, 59 N. W. 752; *Coffman v. Niagara Fire Ins. Co.*, 57 Mo. App. 647; *Roumage v. Mechanics' Fire Ins. Co.*, 13 N. J. Law, 110, 1 Bennett, Fire Ins. Cas. 389; *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419, 34 Pac. 1059; *O'Conner v. Hartford Fire Ins. Co.*, 31 Wis. 160; *Hibernia Mut. Fire Ins. Co. v. Meyer*, 39 N. J. Law, 482; *Travellers' Ins. Co. v. Edwards*, 122 U. S. 466, 7 Sup. Ct. 1252; *Edwards v. Travelers' Life Ins. Co.*, 20 Fed. 661; *Watertown Fire Ins. Co. v. Grover & B. Sewing Machine Co.*, 41 Mich. 131, 1 N. W. 961.

In *Kahn v. Traders' Ins. Co.*, supra, the court said: "There is no

The provisions of a policy requiring the insured to state in his proofs of loss his interest and title, mean his interest and title at the time of the loss. A statement in proofs that the origin and cause of the fire are unknown to the insured is sufficient, (unless the assured was the incendiary)¹³⁹ and it need not state that the loss did not occur by design, invasion, public enemy, etc.¹⁴⁰ But a provision that the insurance shall not be payable until the insured shall have delivered to the company a particular account in writing under oath stating the nature and value of his interest, makes the rendition of an account truly stating those matters and facts imperative.¹⁴¹ The failure of an insured to state in his proofs of loss the name of the occupant of the building at the time of the fire, as required by the policy, is not fatal to his right to recover, where the loss was afterwards investigated by the company and no prejudice to the latter shown.¹⁴²

A requirement that the insured shall in case of fire separate the damaged and undamaged personal property and make a complete inventory thereof, does not compel the making of an inventory of property which is totally destroyed.¹⁴³

If the insured has no definite knowledge or information

force in the objection that the company did not have sufficient notice of the loss. They had such notice as induced them to send their general agent to the place to investigate the loss. Any notice that produces such a result is sufficient without reference to its form or particulars. There is no question that notice was promptly given to the local agents; and that, under the circumstances, must suffice."

¹³⁹ Jones v. Howard Ins. Co., 117 N. Y. 103.

¹⁴⁰ Catlin v. Springfield Fire Ins. Co., 1 Sumn. 434, Fed. Cas. No. 2,522, 1 Bennett, Fire Ins. Cas. 436.

¹⁴¹ Wellcome v. Peoples' Equitable Mut. Fire Ins. Co., 2 Gray (Mass.), 481.

¹⁴² Commercial Union Assur. Co. v. Meyer, 9 Tex. Civ. App. 7, 29 S. W. 93.

¹⁴³ Johnston v. Farmers' Fire Ins. Co., 106 Mich. 96, 64 N. W. 5.

as to the origin or circumstances of the fire, the provisions of a policy requiring the insured to state in his proofs of loss such knowledge or information as he can obtain concerning the origin and circumstances of the fire are sufficiently complied with by a statement that the building was totally destroyed; that the fire occurred at a specified time and did not originate by any act or procurement on the part of the insured, or in consequence of his fraud; and that the insured had not done or consented to the doing of anything violative of the provisions of the policy or which would render it void.¹⁴⁴ And the provisions of an accident insurance policy requiring immediate notice of injury or death of the insured to be given in writing is complied with by a letter, advising the company of the death of the insured, and requesting it to notify the writer if further proofs were required.¹⁴⁵

A written notice to an insurance company of a loss under its policy, accompanied by an affidavit stating that the origin of the fire is unknown to the insured, and that the loss is total, entire, and complete, satisfies the provisions in the policy requiring "satisfactory proofs" of loss, as well as the requirement of Iowa Code, § 1742, that notice in writing must be given to the company of the loss, accompanied by an affidavit stating how the loss occurred, so far as known, and

¹⁴⁴ *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389.

¹⁴⁵ *McFarland v. United States Mut. Acc. Ass'n*, 124 Mo. 204, 27 S. W. 436. In this case the court said: "Notice of an accidental injury is required to give the full name, occupation, and address of the member, with full particulars of the accident and injury, but, in the case of death, immediate notice thereof 'in like manner' only is required. The words in 'like manner' refer, evidently, to the method of giving the notice, and not to the information required to be given thereby. It was only necessary to give such notice as would advise the association that death had occurred from accidental injury."

the extent of the loss.¹⁴⁶ And the notice and affidavit may be furnished separately within the prescribed time.¹⁴⁷

The phrase "proof of death" of the insured does not mean proof as to the cause of the death, nor does it contemplate the furnishing of a physician's certificate.¹⁴⁸ The conditions of a policy requiring a statement in proofs of loss as to other insurance on the property destroyed do not necessitate the statement that there was no other insurance; a provision requiring a certificate from a magistrate not next of kin to the insured does not require a statement in the proofs to that effect, but such must be the fact. But a provision requiring a statement as to the ownership of the property and the interest of the insured therein must be specifically complied with, unless waived by the insurer.¹⁴⁹

Copies of Instruments.

A provision of a policy that in case of loss the insured shall furnish a statement of other insurance and copies of all policies upon the property does not require the insured to furnish a copy of the policy sued on, nor does it require a literally exact copy of other policies, but is complied with by furnishing copies which are substantially correct. And an erroneous statement in the copy, if not prejudicial to the insurer, is immaterial, nor is a copy of the application for insurance necessary.¹⁵⁰

A requirement in an insurance policy, that proofs of loss

¹⁴⁶ *Parks v. Anchor Mut. Fire Ins. Co.*, 106 Iowa, 402, 76 N. W. 743.

¹⁴⁷ *Russell v. Fidelity Fire Ins. Co.*, 84 Iowa, 93, 50 N. W. 546.

¹⁴⁸ *Buffalo L. T. & S. Deposit Co. v. Knights Templar & M. Mut. Aid Ass'n*, 126 N. Y. 450; *Western C. T. Ass'n v. Smith*, 56 U. S. App. 393, 85 Fed. 401. See *Simons v. Iowa State T. M. Ass'n*, 102 Iowa, 267, 71 N. W. 254.

¹⁴⁹ *Erwin v. Springfield F. & M. Ins. Co.*, 24 Mo. App. 145.

¹⁵⁰ *Miller v. Hartford Fire Ins. Co.*, 70 Iowa, 704, 29 N. W. 411.

furnished thereunder shall contain a copy of the description and schedules in other policies on the property insured, is sufficiently complied with by giving a list of all such policies containing the names of the companies which respectively issued them, their respective amounts, and dates of expiration, and offering to furnish copies of all the written parts of such policies on demand.¹⁵¹

Several Insurers.

The provision in a policy requiring the insured to furnish a full and detailed statement of the loss and the amount claimed does not require that the insured shall attempt to compute or state the share of loss to be borne by each insurer where there are several insurers who are liable.¹⁵²

Two Fires and One Policy.

When goods in two separate buildings are covered by one policy and made distinct subjects of insurance, the proofs of loss in case of fire should state the damage to the goods in each building separately.¹⁵³

Satisfactory Proof.

Where the statute states what proofs of loss must contain, and a policy in terms requires "satisfactory proof," these words must refer to and be held to mean what the statute requires.¹⁵⁴ The term "satisfactory proof," used as descriptive of the nature of the proof to be furnished, means such proof as establishes the fact of the loss and the right of the

¹⁵¹ *Scottish U. & N. Ins. Co. v. Keene*, 85 Md. 264, 37 Atl. 33. See, also, *Towne v. Springfield F. & M. Ins. Co.*, 145 Mass. 582; *West Branch Lumberman's Exchange v. American Cent. Ins. Co.*, 183 Pa. St. 366.

¹⁵² *Fuller v. Detroit F. & M. Ins. Co.*, 36 Fed. 469, 1 L. R. A. 801.

¹⁵³ *Towne v. Springfield F. & M. Ins. Co.*, 145 Mass. 582.

¹⁵⁴ *Parks v. Anchor Mut. Fire Ins. Co.*, 106 Iowa, 402, 76 N. W. 743.

claimant to recover. The insurer cannot demand more than is reasonable and just;¹⁵⁵ and if not satisfied it should call for and demand other and further proofs.¹⁵⁶

A life insurance company whose policy provides for the payment of indemnity within ninety days after the receipt of satisfactory proofs of the death of the insured cannot, after the insured's death, impose additional requirements in respect to the proofs of loss, as, for instance, the requirement that the claimant shall make affidavit stating whether he makes the claim as beneficiary named in the policy, or as assignee.¹⁵⁷

A condition of a policy that proofs "satisfactory to the directors" of the insurer shall be furnished together with such other information as the "directors may think necessary to establish the claim" only necessitates the furnishing of reasonably full and accurate proofs, and the directors can not arbitrarily demand any proof they may desire.¹⁵⁸

Particular Account—Inventory as Part of Proofs.

The insured must, when required by the policy, furnish duplicate or certified copies of bills of articles contained in his statement of loss, and a failure so to do prevents recovery

¹⁵⁵ *Walsh v. Washington Marine Ins. Co.*, 32 N. Y. 427; *Buffalo L. T. & S. Deposit Co. v. Knights Templar & M. Mut. Aid Ass'n*, 126 N. Y. 450; *Flynn v. Massachusetts Ben. Ass'n*, 152 Mass. 288; *Taylor v. Aetna Life Ins. Co.*, 13 Gray (Mass.), 434.

¹⁵⁶ *Fowle v. Springfield F. & M. Ins. Co.*, 122 Mass. 191.

¹⁵⁷ *Braker v. Connecticut Ind. Ass'n*, 27 App. Div. 234, 50 N. Y. Supp. 547.

¹⁵⁸ *Braunstein v. Accidental Death Ins. Co.*, 1 Best & S. 782; *Taylor v. Aetna Life Ins. Co.*, 13 Gray (Mass.), 438 (due proof). But "due notice of an accident" means a notice both of the accident and the cause of it. *Simons v. Iowa State T. M. Ass'n*, 102 Iowa, 267, 71 N. W. 254. But see *Buffalo L. T. & S. Deposit Co. v. Knights Templar & M. Mut. Aid Ass'n*, 126 N. Y. 450; *Western C. T. Ass'n v. Smith*, 56 U. S. App. 393, 85 Fed. 401.

on the policy unless it be shown that the insured has made proper efforts to obtain them and was unable to obtain the duplicate bills required by the insurer.¹⁵⁹

Failure to furnish plans and specifications of a building destroyed by fire will not prevent recovery for insurance, where the statutes make all the insurers liable for the face of the policy less the depreciation in the building between the time of issuing the policy and the fire, as to which the burden of proof is on the insurer.¹⁶⁰

The term "particular account" does not mean anything more than a statement of the aggregate value of the property. A provision of a policy requiring the insured to furnish "as particular an account of the loss as the nature of the case will admit of" is sufficiently complied with by a correct statement of the amount of loss, where all the papers which could alone furnish the information and accurate details were totally destroyed by fire.¹⁶¹ A reasonable compliance with the terms of a policy requiring a description of the property destroyed is all that is necessary, and where the policy provides for the furnishing of a complete inventory of the property damaged and the quantity and cost of each article and the amount claimed thereon, an inventory of the entire stock

¹⁵⁹ *Langan v. Royal Ins. Co.*, 162 Pa. St. 357; *Beatty v. Lycoming Co. Mut. Ins. Co.*, 66 Pa. St. 9; *German Ins. Co. v. Pearlstone*, 18 Tex. Civ. App. 706, 45 S. W. 832; *Ward v. National Fire Ins. Co.*, 10 Wash. 361; *Jones v. Mechanics' Fire Ins. Co.*, 36 N. J. Law, 29; *O'Brien v. Commercial Fire Ins. Co.*, 63 N. Y. 108; *Farmers' Fire Ins. Co. v. Mispelhorn*, 50 Md. 180, 53 Md. 473, 9 Ins. Law J. 411.

¹⁶⁰ *Meyer v. Insurance Co. of North America*, 73 Mo. App. 166; *Phoenix Ins. Co. v. Levy*, 12 Tex. Civ. App. 45, 33 S. W. 992.

¹⁶¹ *Norton v. Rensselaer & S. Ins. Co.*, 7 Cow. (N. Y.) 645, 1 Bennett, Fire Ins. Cas. 204; *Miller v. Hartford Fire Ins. Co.*, 70 Iowa, 704; *Harkins v. Quincy Mut. Fire Ins. Co.*, 16 Gray (Mass.), 591; *Erwin v. Springfield F. & M. Ins. Co.*, 24 Mo. App. 145. See post, "Books of Account, Vouchers," etc.

of goods insured, which groups some of the articles collectively, is sufficient.¹⁶²

Examples of Insufficient Proofs.

If the insured must within fourteen days after a loss furnish "as particular account of the property destroyed as the nature and circumstances will admit of," it is not enough to furnish an affidavit and a gross estimate of the loss and a statement of the general character of the property and a further statement that the invoice book of the insured had been burned and the insured had no adequate means of estimating the exact amount of the loss, where it was possible to have made a reasonably correct list and description of the goods furnished. Under such a policy an itemized account and statement of the goods destroyed is contemplated.¹⁶³ If the insured is required to furnish proof including a statement of his interest in the property and fails to insert such a statement in his proof of loss, he cannot maintain an action unless the omission is waived by the officers of the company.¹⁶⁴

¹⁶² *Boyle v. Hamburg-Bremen Fire Ins. Co.*, 169 Pa. St. 349; *Aetna Ins. Co. v. Peoples' Bank of Greenville (C. C. A.)*, 62 Fed. 222; *Catlin v. Springfield Fire Ins. Co.*, 1 Sum. 434, Fed. Cas. No. 2,522, 1 Bennett, Fire Ins. Cas. 436; *Towne v. Springfield F. & M. Ins. Co.*, 145 Mass. 582; *Smith v. Commonwealth Ins. Co.*, 49 Wis. 322; *Peet v. Dakota F. & M. Ins. Co.*, 1 S. D. 462, 47 N. W. 532.

¹⁶³ *Nixon v. Queen Ins. Co.*, 23 Can. Sup. Ct. 26. See, also, *Daniels v. Equitable Fire Ins. Co.*, 50 Conn. 551; *Peoples' Fire Ins. Co. v. Pulver*, 127 Ill. 246; *Fink v. Lancashire Ins. Co.*, 60 Mo. App. 673; *Beatty v. Lycoming Co. Mut. Ins. Co.*, 66 Pa. St. 9; *Summerfield v. Phoenix Assur. Co.*, 65 Fed. 292; *Edgerly v. Farmers' Ins. Co.*, 43 Iowa, 587; *Williams v. Queen's Ins. Co.*, 39 Fed. 167; *Gauche v. London & L. Ins. Co.*, 4 Woods, 102, 10 Fed. 347; *Aetna Ins. Co. v. Peoples' Bank of Greenville (C. C. A.)*, 62 Fed. 224.

¹⁶⁴ *Shawmut Sugar Refining Co. v. Peoples' Mut. Fire Ins. Co.*, 12 Gray (Mass.), 535; *Wellcome v. Peoples' Equitable Mut. Fire Ins. Co.*, 2 Gray (Mass.), 481.

Upon a claim made by Mrs. H. F. Welsh under a fire and lightning policy for loss of a cow claimed to have been killed by lightning, a certificate of a veterinary surgeon to the fact of the cow being killed by lightning, naming Geo. H. Welsh as the owner, is not sufficient proof of loss under Laws Iowa 1880, c. 211, § 3, requiring an affidavit stating the facts.¹⁶⁵

A letter by a member of an accident association stating that he had badly sprained his right foot from favoring his left foot which had been previously injured, does not constitute sufficient notice of an accident to the right foot in stepping from a street car, under a policy requiring "due notice of the accident" to be given within thirty days from the happening of the accident. The court held that the accident of which notice must be given is not the injury alone, but the cause of it as well.¹⁶⁶ Proofs of loss which do not state how the fire originated, or the actual cash value of the property, except by inference, are insufficient under McClain's Iowa Code, (section 1734), requiring that the proofs shall set forth the facts as to how the loss occurred and the extent thereof.¹⁶⁷ Nor is the estimate given by carpenters as to the probable cost of the destroyed building a sufficient compliance.¹⁶⁸

¹⁶⁵ *Welsh v. Des Moines Ins. Co.*, 71 Iowa, 337, 32 N. W. 369. In this case the court said in substance: The policy did not prescribe any specific mode of proof of loss. The Iowa statute requires it to be by "affidavit stating the facts as to how the loss occurred, so far as they were within the assured's knowledge, and the extent of the loss." In this case what is claimed to be proof of loss is not an affidavit. It is a mere certificate of a veterinary surgeon that a cow was struck by lightning, and killed. It does not give the extent of the loss, nor name the plaintiff as the owner of the cow, but fixes the ownership in another. It was held insufficient.

¹⁶⁶ *Simons v. Iowa State T. M. Ass'n*, 102 Iowa, 267, 71 N. W. 254.

¹⁶⁷ *Brock v. Des Moines Ins. Co.*, 96 Iowa, 39, 64 N. W. 685.

¹⁶⁸ *Heusinkveld v. St. Paul F. & M. Ins. Co.*, 96 Iowa, 224, 64 N. W. 769.

CERTIFICATES OF MAGISTRATE, NOTARY PUBLIC, ETC.

§ 173. Provisions requiring the insured to furnish with the proofs, or "when required," the certificates of some designated official or individual, are valid and binding unless prohibited by statute.

The great preponderance of judicial opinion is in favor of the rule that conditions in policies requiring the insured to serve either with and as a part of his proofs or within a given time thereafter or "if required," the certificate of some designated magistrate, notary public, physician, or other party, to the effect that the fire, loss, death, or accident for which claim is to be made happened under given circumstances, are material and valid; and if the furnishing of them is made a condition precedent to a right of recovery by insured, full compliance on his part is necessary unless waived by the insurer. When the stipulation is absolute, the rights of the parties are governed by what has been said as to proofs and their contents;¹⁶⁹ but the provisions of a policy compelling the insured to furnish a certificate "if required" are not operative until the certificate is formally required by the insurer.¹⁷⁰ The certificate of the physician attending the insured prior to his death is not a necessary part of the proofs of loss unless made so either by separate provision of the pol-

¹⁶⁹ *Turley v. North American Fire Ins. Co.*, 25 Wend. (N. Y.) 374, 2 Bennett, Fire Ins. Cas. 50; *Columbia Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507, 2 Pet. 25; *Welsh v. Des Moines Ins. Co.*, 71 Iowa, 337; *German-American Ins. Co. v. Etherton*, 25 Neb. 505, 41 N. W. 406; *Williams v. Queen's Ins. Co.*, 39 Fed. 167; *Protection Ins. Co. v. Pherson*, 5 Ind. 417; *Leadbetter v. Aetna Ins. Co.*, 13 Me. 265; *Van Poucke v. Netherland St. V. de P. Soc.*, 63 Mich. 378, 29 N. W. 863; *Fink v. Lancashire Ins. Co.*, 60 Mo. App. 673; *Summerfield v. Phoenix Assur. Co.*, 65 Fed. 292; *Daniels v. Equitable Fire Ins. Co.*, 50 Conn. 551. As to time of furnishing, see *Badger v. Glens Falls Ins. Co.*, 49 Wis. 389.

¹⁷⁰ *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389; *Jones v. Howard Ins. Co.*, 117 N. Y. 103, and cases *infra*.

icy or by custom and usage to that effect known to the assured.¹⁷¹

Under the provisions of a standard fire insurance policy providing that the insured shall, if required, furnish a certificate of the disinterested magistrate or notary living nearest to the place of the fire, stating that he has examined the circumstances and believes the insured has honestly sustained a loss to the amount certified to, and that no action on the policy for the recovery of any claim can be sustained until after full compliance by insured with all of the requirements of the policy, the furnishing by the insured of a certificate in the manner and form aforesaid, if required so to do by the insurer, is a condition precedent to the right of the insured to recover, and his inability to furnish such certificate because of the arbitrary refusal of the magistrate or notary public for any cause whatever to give such certificate, does not excuse the failure to furnish it, unless such failure is caused by the insurer.¹⁷² If such certificate be furnished voluntarily by the insured, it is mere surplusage and of no effect except that statements contained therein might afterwards be used as evidence against him.¹⁷³

It has been held that the requirement of a policy that the insured shall furnish a certificate by the nearest notary public or justice of the peace not interested in any way, as to the honesty of the loss, is excused where the nearest officer

¹⁷¹ Buffalo L., T. & S. Deposit Co. v. Knights Templar & M. Mut. Aid Ass'n, 126 N. Y. 450; Taylor v. Aetna Life Ins. Co., 13 Gray (Mass.), 438.

¹⁷² Lane v. St. Paul F. & M. Ins. Co., 50 Minn. 227; Roumage v. Mechanics' Fire Ins. Co., 13 N. J. Law, 110; Williams v. Queen's Ins. Co., 39 Fed. 167; Aetna Ins. Co. v. Peoples' Bank of Greenville (C. C. A.), 62 Fed. 222; Lehigh v. Springfield F. & M. Ins. Co., 37 Mo. App. 542; Johnson v. Phoenix Ins. Co., 112 Mass. 49; Kelly v. Sun Fire Office, 141 Pa. St. 10, disapproving earlier decisions.

¹⁷³ Merchants' Ins. Co. v. Gibbs, 56 N. J. Law, 679, 29 Atl. 485.

has been retained as attorney by the insurer, and the insured after an attempt in good faith was unable to find any other notary or justice in the town who would act.¹⁷⁴

Contra—Such Provisions Held Invalid.

But in New York it has been held that the refusal of an attending physician to certify to the proofs of loss on the ground that his bill had not been paid was good excuse for failure to furnish the certificate. The court said: "The claimants under a policy of insurance are not required to perform impossible conditions. They are bound to use diligent efforts to comply with the stipulated conditions, but if prevented from doing so without fault or negligence on their part, they are not thereby precluded from recovering in a contested case."¹⁷⁵ And the Kentucky court of appeals has held invalid a condition requiring a certificate of the nearest magistrate or notary public that he has examined the circumstances and believes that the insured has honestly sustained the loss to the amount certified, upon the ground that there was no law under which such officer could be required to certify at all.¹⁷⁶ A provision requiring the insured to have his proofs certified to by an agent or officer of the insurer is unreasonable and void.¹⁷⁷ But it seems that a by-law of a mutual benefit insurance society which invests a committee with authority to determine whether a member, claiming to be sick, is entitled to benefits provided for sick and disabled

¹⁷⁴ *De Land v. Aetna Ins. Co.*, 68 Mo. App. 277.

¹⁷⁵ *O'Neill v. Massachusetts Benefit Ass'n*, 63 Hun (N. Y.), 292; *Aetna Ins. Co. v. Miers*, 5 Sneed (Tenn.), 139.

¹⁷⁶ *Hoke v. Richie*, 100 Ky. 66, 37 S. W. 266, 38 S. W. 132; *Home Fire Ins. Co. v. Hammang*, 44 Neb. 566, 62 N. W. 883.

¹⁷⁷ *Young v. Grand Council, A. O. of A.*, 63 Minn. 506; *Campbell v. American Popular Life Ins. Co.*, 1 MacArthur, D. C. 471.

members, is valid and reasonable, and the action of the committee on the question is final.¹⁷⁸

Statutory Regulation.

In some states the apparent hardship resulting occasionally from the existence and enforcement of such provisions has moved the legislatures to declare them invalid.¹⁷⁹

Under the Civil Code of California, (section 2637), providing that it shall be sufficient to furnish reasonable evidence that the refusal of the nearest notary or magistrate to subscribe to the notice of loss was not induced by any just disbelief in the facts necessary to be certified, if the notary nearest to the scene of the fire refuses to furnish the certificate because of the fact that he is in the employ of the insurer, the insured is not required to furnish absolute proof of such employment, nor need he inform the insurer in his proofs, nor at the time of furnishing them, of the reason for obtaining the certificate of another notary.¹⁸⁰

“If Required” — What is a Demand.]

Where a policy does not call for a certificate unless “if required” and an insufficient certificate has been voluntarily furnished by the insured with his proofs, an objection made by the insurer to the proofs because the certificate of the nearest notary has not been furnished as provided by the

¹⁷⁸ Van Poucke v. Netherland St. V. de P. Soc., 63 Mich. 378, 29 N. W. 863; Raymond v. Farmers' Mut. Fire Ins. Co., 114 Mich. 386, 72 N. W. 255; Campbell v. American Popular Life Ins. Co., 1 MacArthur, D. C. 471.

¹⁷⁹ Laws Wis. 1891, c. 195, § 1; Laws Wis. 1893, c. 124; Gen. Laws Minn. 1895, c. 175, § 25; Civil Code Cal. § 2637; Gen. St. Conn. § 2839; 2 Rev. St. Ind. 1888, § 3770; Rev. St. Me. 1883, § 21, p. 446; Rev. Laws Vt. 1880, § 3626; Shannon v. Hastings Mut. Ins. Co., 2 Ont. App. 81; Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315; Bailey v. Hope Ins. Co., 56 Me. 474; Rev. Codes N. Dak. § 4530.

¹⁸⁰ Noore v. Transatlantic Fire Ins. Co., 88 Cal. 152.

policy is not a requirement of such certificate;¹⁸¹ but when the proofs given by the insured contained a certificate not made by the proper officer, and the company replied that the proofs were incomplete and insufficient because they did not meet the requirements of the policy in respect to the magistrate or notary, and said "for the above reasons we decline to accept the proofs you have offered as sufficient under the requirements of the policy," it has been held that the condition became operative, and that the insured must furnish a new and proper certificate before he can recover.¹⁸²

When Demand Must be Made.

The insurer should seasonably avail itself of the right to demand a certificate if it is not satisfied with the mere production of the preliminary proofs. The mere delay of thirty-seven days after receipt of proofs and before demanding a certificate is no waiver of the right to demand it where the policy was not payable until sixty days after proof of loss and plaintiff does not claim that the delay prevented him from obtaining the certificate so that he could begin suit at the end of the sixty days or that it in any way prejudiced him.¹⁸³ But a delay of five weeks has been held sufficient ground for find-

¹⁸¹ *Jones v. Howard Ins. Co.*, 117 N. Y. 103; *Burnett v. American Cent. Ins. Co.*, 68 Mo. App. 343.

¹⁸² *Williams v. Queen's Ins. Co.*, 39 Fed. 167. And see *Aetna Ins. Co. v. Peoples' Bank of Greenville (C. C. A.)*, 62 Fed. 224; *Paltrovitch v. Phoenix Ins. Co.*, 143 N. Y. 73, 25 L. R. A. 198; *Merchants' Ins. Co. v. Gibbs*, 56 N. J. Law, 679, 29 Atl. 485.

Notice to the insured to comply strictly with the terms of the policy is not notice to furnish a certificate of a magistrate or notary public, which need be furnished only if required. *Moyer v. Sun Ins. Office*, 176 Pa. St. 579.

¹⁸³ *Williams v. Queen's Ins. Co.*, 39 Fed. 168.

ing a waiver.¹⁸⁴ Mere delay in demanding a certificate will not extend the time fixed by the policy for bringing suit.¹⁸⁵

Effect of Insurer Demanding Certificate.

A demand by an insurer for a certificate of a magistrate or notary is a waiver of defects in the proofs already furnished by the insured and of the objection that the proofs were not furnished in proper time. It can not be construed as a demand for further or amended proofs, and does not extend the time for bringing suit, when, under the policy in question, liability accrues sixty days after proofs have been furnished and suit must be brought within twelve months after the fire.¹⁸⁶ Nor will delay in furnishing the certificate extend that time.¹⁸⁷

Nearest Magistrate or Notary.

Under a provision that the insured "shall, if required, produce a certificate of a magistrate or notary public nearest to the place of the fire," the certificate of the nearest officer of the classes named—whether magistrate or notary—is necessary. The certificate of the nearest magistrate is insufficient where there is a nearer notary.¹⁸⁸

¹⁸⁴ *Keeney v. Home Ins. Co.*, 71 N. Y. 396. For rule when certificate must be furnished without demand, see *Daniels v. Equitable Fire Ins. Co.*, 50 Conn. 551; *Fink v. Lancashire Ins. Co.*, 60 Mo. App. 673; *Summerfield v. Phoenix Assur. Co.*, 65 Fed. 292. On-waiver by insurer of its right to demand a certificate, see *Daniels v. Equitable Fire Ins. Co.*, *supra*; *Williams v. Queen's Ins. Co.*, 39 Fed. 168, and post, "Waiver."

¹⁸⁵ *Merchants' Ins. Co. v. Gibbs*, 56 N. J. Law, 679. See, also, *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389.

¹⁸⁶ *Merchants' Ins. Co. v. Gibbs*, 56 N. J. Law, 679, 29 Atl. 485.

¹⁸⁷ *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389.

¹⁸⁸ *Williams v. Queen's Ins. Co.*, 39 Fed. 168. And see *Ben Franklin Fire Ins. Co. v. Flynn*, 98 Pa. St. 628; *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459.

A notary public is not a magistrate within the meaning of the condition of a policy requiring the certificate of the nearest magistrate.¹⁸⁹ In determining the contiguity of a magistrate or notary to the place of fire, the place of his business and not his residence will be regarded, and no nice calculations of distance will be gone into to ascertain the nearest person who might give the certificate. Where there are several such officers in the immediate neighborhood, the certificate of any one of them will be a sufficient compliance with the conditions of the policy, and a distance of a few yards more or less will not be regarded as a matter of any importance. The provision is liberally construed. Good faith on the part of the insured, an honest effort and intention to comply, and the proximity of the magistrate to the place of the fire are all that can be required.¹⁹⁰

It was recently held in New York that the provision of a policy that proofs of loss shall be accompanied by the certificate of the magistrate or notary public nearest the place of the fire, is sufficiently complied with by obtaining a certificate of a notary residing four blocks from the place of the fire, who keeps his office two or three blocks in the other direction and passes the scene of the fire several times daily in going to and from his office and his home; although there were notaries living nearer the place of the fire but having no notarial seal at their residences, where the insured acts in good

¹⁸⁹ *Cayon v. Dwelling House Ins. Co.*, 68 Wis. 510, 32 N. W. 540.

¹⁹⁰ *Smith v. Home Ins. Co.*, 47 Hun (N. Y.), 39; *Agricultural Ins. Co. v. Bemiller*, 70 Md. 401; *Williams v. Niagara Fire Ins. Co.*, 50 Iowa, 561; *Turley v. North American Fire Ins. Co.*, 25 Wend. (N. Y.) 374, 2 Bennett, *Fire Ins. Cas.* 50; *American Cent. Ins. Co. v. Rothchild*, 82 Ill. 166; *Peoria M. & F. Ins. Co. v. Whitehill*, 25 Ill. 466; *German American Ins. Co. v. Etherton*, 25 Neb. 505, 41 N. W. 406. But see *Protection Ins. Co. v. Pherson*, 5 Ind. 417; *Leadbetter v. Etna Ins. Co.*, 13 Me. 265.

faith and is informed and believes that the magistrate whose certificate be procured is in fact the nearest magistrate, and the proofs of loss thus certified are furnished to the insurer which retains them for twenty-three days without objection and then demands a new certificate without furnishing any information as to whom it considers to be or who is the proper notary or magistrate to sign the certificate.¹⁹¹

Disinterested — Not Concerned in Loss.

The words "disinterested" or "not concerned in the loss" when used as descriptive of the magistrate or officer who must certify to the proofs, mean one of the enumerated classes who is not concerned in the loss by reason of having an interest in the property insured or in the policy or its proceeds as security for an obligation or otherwise—one who will neither make or lose directly or indirectly by the determination of the rights and obligations in respect to the loss. It does not disqualify a mere general creditor of the insurer.¹⁹² An agent or employe of the insurer is disqualified.¹⁹³ A magistrate who owned a house (next to the plaintiff's) which was destroyed by the same fire which burned a building of the plaintiff against whom the magistrate had entered a complaint for setting the fire is "concerned in the loss" because a certificate made by him to the effect that the fire was honest would be conclusive against him in his own right to recovery.¹⁹⁴

¹⁹¹ *Paltrovitch v. Phoenix Ins. Co.*, 143 N. Y. 73, 25 L. R. A. 198.

¹⁹² *Dolliver v. St. Joseph F. & M. Ins. Co.*, 131 Mass. 39; *Smith v. Home Ins. Co.*, 47 Hun (N. Y.), 39. But see *Aetna Ins. Co. v. Miers*, 5 Sneed (Tenn.), 139.

¹⁹³ *Noone v. Transatlantic Fire Ins. Co.*, 88 Cal. 152; *Young v. Grand Council, A. O. of A.*, 63 Minn. 506; *De Land v. Aetna Ins. Co.*, 68 Mo. App. 277; *Campbell v. American Popular Life Ins. Co.*, 1 MacArthur, D. C. 471.

¹⁹⁴ *Wright v. Hartford Fire Ins. Co.*, 36 Wis. 522; *Ganong v. Aetna Ins. Co.*, 6 Allen (N. B.), 75.

A statement by a magistrate in his certificate that he is not concerned in the loss, is *prima facie* evidence of that fact.¹⁹⁵

Not Related to Insured.

A notary who has married the first cousin of the insured is "related" to him so as to be disqualified to give a certificate to accompany the proof of loss, within the meaning of a policy requiring a certificate from one "not related to the insured."¹⁹⁶

Physician's Certificate.

An "attending physician" is the family physician of the insured if he have one. Thus, where a retired physician, being a friend and neighbor of the deceased, was called in before the arrival of the regular family physician who took charge of the case, it has been held that the certificate of the latter only is required.¹⁹⁷ Under the provision of a policy requiring the sworn certificate of the attending physician, the insured is not bound to furnish a certificate from a physician who had not attended or treated him for some years before his death.¹⁹⁸ The certificate of a physician who, in a foreign city, attended a member of a benefit association, together with the certificate of the mayor of such city, and the evidence of the plaintiff that he saw them both sign the certificates, is a sufficient compliance with the by-laws of the association requiring a medical certificate signed or authenticated by the legal authorities of the place where the member was sick.¹⁹⁹

¹⁹⁵ *Cornell v. Le Roy*, 9 Wend. (N. Y.) 163.

¹⁹⁶ *Peoples' Bank of Greenville v. Aetna Ins. Co. (C. C. A.)*, 74 Fed. 507.

¹⁹⁷ *Gibson v. American Mut. Life Ins. Co.*, 37 N. Y. 580.

¹⁹⁸ *Flynn v. Massachusetts Ben. Ass'n*, 152 Mass. 288.

¹⁹⁹ *Mutual A. & I. Soc. v. Monti*, 59 N. J. Law, 341, 36 Atl. 666. And see *Welsh v. Des Moines Ins. Co.*, 71 Iowa, 337; *Dreier v. Conti-*

When Certificate Must be Furnished.

As we have already seen, a requirement of a policy that the certificate of some designated party be furnished with the proofs as a condition precedent to recovery, must be strictly complied with unless compliance be prevented or waived by the insurer;²⁰⁰ but when a certificate need only be furnished "if required," the failure of the insured to attach a certificate to his proofs of loss is immaterial unless one is demanded by the insurer.²⁰¹ When the policy stipulates that the insured shall furnish proofs of loss and the certificate if required so to do, the provisions are severable, as those relating to notice and proofs; and the acceptance of proofs of loss as compliance with one condition, cannot be construed as amounting to a waiver of compliance with the other.²⁰² Under such a condition the company may call for the certificate or not as it deems necessary. It can call for it at any time before payment unless waived, and when called for the insured may comply with the demand in a reasonable time and before the commencement of the action. The certificate is some-

mental Life Ins. Co., 24 Fed. 670; *Spitz v. Mutual Life Ass'n*, 54 N. Y. St. Rep. 818, 25 N. Y. Supp. 469; *Redmond v. Industrial Ben. Ass'n*, 78 Hun (N. Y.), 104; *Clemans v. Supreme Assembly, R. S. of G. F.*, 131 N. Y. 485; *Day v. Mutual Ben. Life Ins. Co.*, 1 MacArthur, D. C. 598; *Connecticut Mut. Life Ins. Co. v. Siegel*, 9 Bush (Ky.), 450.

²⁰⁰ *Fink v. Lancashire Ins. Co.*, 60 Mo. App. 673; *Daniels v. Equitable Fire Ins. Co.*, 50 Conn. 551; *Summerfield v. Phoenix Assur. Co.*, 65 Fed. 292.

²⁰¹ *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389; *Merchants' Ins. Co. v. Gibbs*, 56 N. J. Law, 679.

²⁰² *Lane v. St. Paul F. & M. Ins. Co.*, 50 Minn. 227. See ante, "Notice and Proofs of Loss." For waiver of certificate, see post, "Waiver," and *Turley v. North American Fire Ins. Co.*, 25 Wend. (N. Y.) 374; *Daniels v. Equitable Fire Ins. Co.*, 50 Conn. 551; *Keeney v. Home Ins. Co.*, 71 N. Y. 396; *Williams v. Queen's Ins. Co.*, 39 Fed. 168.

thing the company may require; but is not an absolute requirement of the policy to be complied with before the sixty days begin to run. In a New York case the policy became payable in event of fire sixty days after full compliance by the insured with all the conditions. Proofs had been duly furnished and a certificate had been demanded. The insured applied to a magistrate of the town to make a certificate. He declined. Then he applied to another magistrate who was an attorney; he, after keeping the papers three months, informed the insurer that he was unable to make the certificate as he had been retained as counsel for the defendant. Plaintiff then applied to a third magistrate. At that time, however, there had been some negotiations in regard to a settlement, and a promise had been made to settle and pay plaintiff's claim if he would bring his figures "down to hard pan," and in consequence of this the statement as to value was reduced. Soon thereafter the certificate was furnished. Under these circumstances it was held that the delay in furnishing the certificate did not, as a matter of law, defeat plaintiff's cause of action; but it presented a question of fact for a jury whether or not the conduct of plaintiff with respect to the certificate was diligent and reasonable.²⁰³

Contents of Certificate.

Clauses in policies governing or regulating the contents of certificates are construed with the same liberality as similar clauses concerning notice and proof of loss. A certificate need not be in the precise words specified in the policy. If it be so drawn as to evidently mean the same thing it is enough. Accordingly, when a condition required that the magistrate should state in his certificate that he was acquainted

²⁰³ McNally v. Phoenix Ins. Co., 137 N. Y. 389; Summerfield v. Phoenix Assur. Co., 65 Fed. 292, cases ante.

with the character and circumstances of the person insured, and that having investigated the circumstances in relation to the loss, he knew or verily believed that the insured had sustained loss to the amount mentioned in the certificate, it was held that a certificate of a magistrate that he resided within two miles of the place where the fire occurred, and was acquainted with the assured, and that the assured had sustained loss to the amount of the value of the building mentioned in the account of loss of the insured, was a sufficient compliance with the conditions mentioned.²⁰⁴

The requirement of a policy of insurance, that the proofs of loss "shall be signed and sworn to by the insured," means that the oath or a certificate thereof shall be in writing, and a certificate of the officer which does not state that the affiant made oath before him is fatally defective.²⁰⁵ And a condition that the magistrate must certify that the notice of loss was sworn to before him and that he believed it to be true, is complied with by a magistrate's certificate stating that it was sworn to before him, and that he believed the insured had really by misfortune, and without fraud or evil practice, sustained by the fire damage to the amount stated in the affidavit.²⁰⁶ A provision requiring a certificate from a magistrate not next of kin to the insured, does not require a statement in the proofs to that effect, but such must be the fact; and if the magistrate be disqualified the burden is upon the insurer to establish that fact.²⁰⁷ But it has been held that when the policy requires

²⁰⁴ *Aetna Fire Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385; *Turley v. North American Fire Ins. Co.*, 25 Wend. (N. Y.) 374; *Paltrovitch v. Phoenix Ins. Co.*, 143 N. Y. 73, 25 L. R. A. 198.

²⁰⁵ *McManus v. Western Assur. Co.*, 22 Misc. Rep. 269, 48 N. Y. Supp. 820.

²⁰⁶ *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553.

²⁰⁷ *Erwin v. Springfield F. & M. Ins. Co.*, 24 Mo. App. 145; *Cornell v. Le Roy*, 9 Wend. (N. Y.) 163, 1 Bennett, Fire Ins. Cas. 408;

that there be furnished with the proofs of loss a certificate of the nearest notary that he has examined the circumstances and believes that the insured has honestly sustained a loss to the amount certified, the certificate is insufficient unless it states that the notary is the one living nearest to the place of fire and that he examined into the circumstances of the case and believes that the insured has honestly sustained the loss claimed.²⁰⁸ And a certificate signed by a person disqualified by the policy is insufficient.²⁰⁹

WHO MUST FURNISH NOTICE AND PROOF.

§ 174. Notice and proof must be given by the party designated in the policy.

Notice and proofs must, if possible, be given by the one upon whom the policy imposes that duty.²¹⁰ The court will not, for the purpose of enforcing a forfeiture against an insured, supply the omission of a provision in a policy to specify by whom the notice shall be given.²¹¹ In the absence of any

Lounsbury v. Protection Ins. Co., 8 Conn. 459; *Noone v. Transatlantic Fire Ins. Co.*, 88 Cal. 152.

²⁰⁸ *Fink v. Lancashire Ins. Co.*, 60 Mo. App. 673; *Simmons v. West Virginia Ins. Co.*, 8 W. Va. 474. See, also, *Summerfield v. Phoenix Assur. Co.*, 65 Fed. 292.

²⁰⁹ *Aetna Ins. Co. v. Peoples' Bank of Greenville (C. C. A.)*, 62 Fed. 222; *Williams v. Queen's Ins. Co.*, 39 Fed. 167; *Daniels v. Equitable Fire Ins. Co.*, 50 Conn. 551. See, also, *Agricultural Ins. Co. v. Bemiller*, 70 Md. 400; *Mann v. Western Assur. Co.*, 17 Up. Can. Q. B. 199; *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329; *Flynn v. Massachusetts Ben. Ass'n*, 152 Mass. 288.

²¹⁰ *Newman v. Springfield F. & M. Ins. Co.*, 17 Minn. 123 (Gil. 98); *Mcgraw v. Germania Fire Ins. Co.*, 54 Mich. 145, 19 N. W. 931; *Aetna Ins. Co. v. Peoples' Bank of Greenville (C. C. A.)*, 62 Fed. 222; *Daniels v. Equitable Fire Ins. Co.*, 50 Conn. 551; *Stephenson v. Bankers' Life Ass'n*, 108 Iowa, 637, 79 N. W. 459.

²¹¹ *Prendergast v. Dwelling House Ins. Co.*, 67 Mo. App. 426. This policy provided that " * * * should give immediate notice in writing of loss, and should within sixty days render * * * a verified

provision in the policy fixing the parties by whom and to whom the notice shall be given, a notice of loss given by the local agent to his company and acted upon by the latter is sufficient, and, generally speaking, any notice given by any person and upon which the insurer acts, is sufficient.²¹²

The provisions of a policy requiring notice to be given in writing to the home office are complied with when notice is given to the insurer by its local agent based upon information secured by him from the insured.²¹³ Substantial compliance with the provisions of a policy is enough.²¹⁴ But the statement and proofs of loss concerning the property destroyed must be made and sworn to by the insured personally, when so required by the policy.²¹⁵ Thus, where a policy contained a provision requiring "all persons insured by this company to deliver a particular account of loss or damage signed by their own hands and containing," etc., it was held that notice given for and on behalf of the insured by a third party who was interested in the policy, but was not an agent of the insured, was insufficient.²¹⁶

Proofs of loss furnished by one not legally entitled to fur-

statement, etc;" and the court held that this did not impose on any one the duty of furnishing proofs.

²¹² *Phoenix Ins. Co. v. Perry*, 131 Ind. 572, 30 N. E. 637; *Partridge v. Milwaukee Mechanics' Ins. Co.*, 13 App. Div. 519, 43 N. Y. Supp. 632; *Brink v. Hanover Fire Ins. Co.*, 70 N. Y. 593; *Travellers' Ins. Co. v. Edwards*, 122 U. S. 457; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473, 61 N. W. 740; *Peele v. Provident Fund Soc.*, 147 Ind. 543.

²¹³ *American Acc. Ins. Co. v. Norment*, 91 Tenn. 1, 18 S. W. 395; *Bennett v. Maryland Fire Ins. Co.*, 14 Blatchf. 422, Fed. Cas. No. 1,321.

²¹⁴ *Karelsen v. Sun Fire Office*, 122 N. Y. 545; *West Rockingham Mut. Fire Ins. Co. v. Sheets*, 26 Grat. (Va.) 854.

²¹⁵ *Spaulding v. Vermont Mut. Fire Ins. Co.*, 53 Vt. 156; *State Ins. Co. v. Maackens*, 38 N. J. Law, 564.

²¹⁶ *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 179; *Spaulding v. Vermont Mut. Fire Ins. Co.*, 53 Vt. 156.

nish them may be adopted by one who has legal right to furnish proofs of loss with the consent of the insurer. Thus, where an administrator, with the implied assent of an accident indemnity association, adopts and relies upon the act of a third person who has filed with the association proof of a claim growing out of the accidental killing of such administrator's intestate who was a member of defendant, the association cannot defeat recovery under the policy upon the ground that it was incumbent upon the administrator to file the proofs himself, and that he could not, with the implied consent of defendant, adopt as his own proofs filed and served by such third person.²¹⁷

Proofs of death furnished to an insurer by an aunt of the deceased and retained without objection, are available to the mother in an action brought by her upon the policy which is payable to any relative by blood of the insured, and requires that the proofs shall contain answers to each question propounded to the claimant in blanks furnished by the insurer.²¹⁸

In case of loss or damage by fire after the death of the original insured and before the appointment of a legal representative, those interested in the estate and in securing indemnity under a policy of insurance must make proper and reasonable efforts to see that the covenants and conditions of the policy concerning notice and proof of loss are complied with, and within a reasonable time must use such agencies as the law provides to secure that result.²¹⁹ Proofs of loss are

²¹⁷ *Wilson v. Northwestern Mut. Acc. Ass'n*, 53 Minn. 470; *Loeb v. American Cent. Ins. Co.*, 99 Mo. 50.

²¹⁸ *Kelly v. Metropolitan Life Ins. Co.*, 15 App. Div. 220, 44 N. Y. Supp. 179; *Graham v. Phoenix Ins. Co.*, 17 Hun (N. Y.), 156.

²¹⁹ *Matthews v. American Cent. Ins. Co.*, 154 N. Y. 449, 39 L. R. A. 433; *Farmers' Mut. Ins. Co. v. Graybill*, 74 Pa. St. 17.

properly furnished by the trustee, successor to the trustee and agent to whom the policy was payable in case of loss.²²⁰

One for whose indemnity a policy of insurance was issued under such circumstances as to entitle him to enforce the same if the conditions are complied with, is the proper person to make proofs of loss, although the policy was issued to another person.²²¹ And proofs of loss required by a policy of insurance may be made by the agent of the insured, where the latter is not in a position to make them in person, and the objection that proofs of loss were made by an agent of the insured, rather than by the insured, is waived where the company bases its refusal to pay the loss on the ground that the person named as the insured was dead when the policy was issued.²²² The agent must have either express or implied power to act; a self-constituted agency is insufficient.²²³

When a husband, who owns insured property, is permanently absent and ignorant of a loss, and the surroundings, circumstances, and the kind and value of the property destroyed, and has told his wife to care for the property until he returned, she may make proofs of loss, even though the policy requires the assured to give notice and proof of loss and verify the same by his oath.²²⁴

Where a fire insurance policy is issued to a husband on a

²²⁰ *Wolcott v. Sprague*, 55 Fed. 545.

²²¹ *Milwaukee Mechanics' Ins. Co. v. Brown*, 3 Kan. App. 225, 44 Pac. 35.

²²² *Lumbermen's Mut. Ins. Co. v. Bell*, 166 Ill. 400, 45 N. E. 130.

²²³ *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176; *Spaulding v. Vermont Mut. Fire Ins. Co.*, 53 Vt. 156; *State Ins. Co. v. Maackens*, 38 N. J. Law, 564; *Wuesthoff v. Germania Life Ins. Co.*, 107 N. Y. 580; *Cannon v. Northwestern Mut. Life Ins. Co.*, 29 Hun (N. Y.), 470; *Sheanon v. Pacific Mut. Life Ins. Co.*, 83 Wis. 507, 53 N. W. 878.

²²⁴ *O'Conner v. Hartford Fire Ins. Co.*, 31 Wis. 160; *Roberts v. Northwestern Nat. Ins. Co.*, 90 Wis. 210. Compare *Spaulding v. Vermont Mut. Fire Ins. Co.*, 53 Vt. 156.

building which is his homestead, and before any loss occurs he abandons his wife, she, and one to whom the loss was by the terms of the policy made payable, may make proofs of loss, although the policy provides that if it is payable in case of loss to a third party or held as collateral security, proofs of loss shall be made by the party originally insured.²²⁵ Proofs may be furnished by a guardian of infants whose property was insured and destroyed;²²⁶ and when the insured is dead, by his heirs and legal representatives.²²⁷

SAME — MORTGAGEE.

§ 175. A mortgagee entitled to the benefits of the insurance may sometimes furnish the notice and proof.

A mortgagee of insured property to whom the loss is payable as his interest may appear, may furnish proofs of loss if the insured neglects and refuses so to do.²²⁸ The New York standard policy declares in substance that no act or neglect of a mortgagor shall defeat the insurance as to the interest of the mortgagee. This does not relieve the mortgagee to whom the loss is payable to the extent of his interest, from furnishing proofs of loss if the mortgagor neglects or refuses so

²²⁵ *Warren v. Springfield F. & M. Ins. Co.*, 13 Tex. Civ. App. 466, 35 S. W. 810.

²²⁶ *Monaghan v. Agricultural Fire Ins. Co.*, 53 Mich. 238, 18 N. W. 801; *O'Brien v. Phoenix Ins. Co.*, 76 N. Y. 459; *Wuesthoff v. Germania Life Ins. Co.*, 107 N. Y. 580.

²²⁷ *Farmers' Mut. Ins. Co. v. Graybill*, 74 Pa. St. 17, 5 Bennett, Fire Ins. Cas. 527; *Wilson v. Northwestern Mut. Acc. Ass'n*, 53 Minn. 470.

²²⁸ *Moore v. Hanover Fire Ins. Co.*, 71 Hun (N. Y.), 199; *Nickerson v. Nickerson*, 80 Me. 100; *Watertown Fire Ins. Co. v. Grover & B. Sewing Machine Co.*, 41 Mich. 131; *Hibernia Mut. Fire Ins. Co. v. Meyer*, 39 N. J. Law, 482; *Armstrong v. Agricultural Ins. Co.*, 56 Hun (N. Y.), 399. See *State Ins. Co. v. Maackens*, 38 N. J. Law, 564; *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 79.

to do.²²⁹ Proofs furnished by the mortgagor will inure to the benefit of the mortgagee.²³⁰ It has been held that a mortgagee to whom a policy is payable as his interest may appear is the insured, within the meaning of a condition of a policy requiring the insured to furnish preliminary proofs of loss.²³¹

SAME — PARTNERSHIP.

§ 176. They may be furnished by any member of an insured firm.

Where the insured is a partnership, the proofs of loss signed and sworn to by one of the partners sufficiently complies with the provisions of a policy that proofs of loss should be signed and sworn to by the insured, unless the company promptly makes specific objection thereto on that ground.²³² And where the insurer has waived the forfeiture resulting from the conveyance of one partner to another, the purchasing partner may make proofs of loss without setting forth therein the assignment to himself of the interest of his co-partner.²³³ The mere addition of the word "treasurer" to the signature of a partner verifying the proofs of loss will not affect their validity unless this was done with fraudulent intent, or unless the insurer has been misled to his damage thereby.²³⁴

²²⁹ *Southern Home B. & L. Ass'n v. Home Ins. Co.*, 94 Ga. 167, 27 L. R. A. 844. But see *contra*, *Dwelling House Ins. Co. v. Kansas Loan & Trust Co.*, 5 Kan. App. 137, 48 Pac. 891, 26 Ins. Law J. 603.

²³⁰ *Watertown Fire Ins. Co. v. Grover & B. Sewing Machine Co.*, 41 Mich. 131. But see *State Ins. Co. v. Maackens*, 38 N. J. Law, 564.

²³¹ *Armstrong v. Agricultural Ins. Co.*, 56 Hun, 399, 130 N. Y. 560; *Moore v. Hanover Fire Ins. Co.*, 71 Hun (N. Y.), 199; *Nickerson v. Nickerson*, 80 Me. 100.

²³² *Myers v. Council Bluffs Ins. Co.*, 72 Iowa, 176, 33 N. W. 453; *Marthinson v. North British & M. Ins. Co.*, 64 Mich. 372.

²³³ *Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 550.

²³⁴ *Karelsen v. Sun Fire Office*, 122 N. Y. 545.

SAME — ASSIGNEE.

§ 177. And by one whose rights as assignee of the policy have been recognized by the insurer.

A purchaser of insured premises to whom is assigned a policy payable to a specified mortgagee as his interest may appear, is the proper person to make proofs of loss, although he has executed a deed to the premises which is void because the grantee is not named therein.²³⁵ Notice of loss given by one to whom the policy has been assigned with the consent of the insurer, is a compliance with a condition that all persons insured shall forthwith give notice, etc.²³⁶

Mutual Societies.

The provisions of the by-laws of mutual insurance companies concerning the giving of proofs of loss are so manifold and diverse that nearly every case is a law unto itself.²³⁷

SAME — CREDITORS.

§ 178. A creditor of the insured may furnish proofs if the insured neglects to do so.

Though the insured does not, upon the happening of a loss, take the necessary steps to perfect his right of action against the insurer, his claim may nevertheless be a valuable asset

²³⁵ Westchester Fire Ins. Co. v. Jennings, 70 Ill. App. 539.

²³⁶ Cornell v. Le Roy, 9 Wend. (N. Y.) 163, 1 Bennett, Fire Ins. Cas. 408; Keeler v. Niagara Fire Ins. Co., 16 Wis. 550; Manhattan Ins. Co. v. Stein, 5 Bush (Ky.), 652; Watertown Fire Ins. Co. v. Grover & B. Sewing Machine Co., 41 Mich. 131; Cannon v. Northwestern Mut. Life Ins. Co., 29 Hun (N. Y.), 470; Smith v. Haverhill Mut. Fire Ins. Co., 1 Allen (Mass.), 297.

²³⁷ Supreme Council, C. B. L., v. Boyle, 10 Ind. App. 301; Anderson v. Supreme Council, O. of C. F., 135 N. Y. 107; Young v. Grand Council, A. O. of A., 63 Minn. 506; Albert v. Order of Chosen Friends, 34 Fed. 721; Lorsch v. Supreme Lodge, K. of H., 72 Mich. 316, 40 N. W. 545.

subject to attachment or garnishment by his creditors; and if he fails to furnish notice or proofs as required by the policy, an attaching or garnishing creditor may in some cases supply the omission. Much depends upon the requirement of the policy and the interpretation of the statute under which a creditor is proceeding. In Texas it has been held that where a policy contains a stipulation that proofs of loss must be made before the insurer can be held bound to pay, no suit can be maintained under the policy until the required proofs are furnished; yet in such cases a writ of garnishment may issue at the instance of a creditor of the insured, the same being not, strictly speaking, a suit, but process authorized by statute to discover whether some debt or obligation exists, though not yet matured; and thereafter the attaching creditor may make the preliminary proofs and enforce whatever claims may exist in favor of the debtor and against the insurer.²³⁸ But in Maine, the rule is that where the policy requires notice and proofs of loss to be given before the claim matures, the claim is contingent until such notice is given and such proofs are furnished, and the insurer cannot be charged as trustee of the insured in a suit begun after the loss but before notice and proofs are served.²³⁹ An insurer may waive the furnishing of proofs of loss in favor of a garnishing creditor of the insured without the insured taking any part in the waiver or having any knowledge thereof.^{239a} A federal court has held that a waiver of proofs in favor of a insured debtor inures to the benefit of a garnishing creditor, and that if at the

²³⁸ *Phoenix Ins. Co. v. Willis*, 70 Tex. 12; *Northwestern Ins. Co. v. Atkins*, 3 Bush (Ky.), 333.

²³⁹ *Davis v. Davis*, 49 Me. 282. The Maine statute read: "No person shall be adjudged trustee unless, at the time of the service of the writ upon him, it [the money] is due absolutely and not upon any contingency.

^{239a} *Ritter v. Boston Underwriters' Ins. Co.*, 28 Mo. App. 140.

time process of garnishment was served upon the insurer it had waived the furnishing of proofs of loss, then the garnishment action could be maintained, otherwise it could not be maintained.^{239b}

TO WHOM GIVEN.

§ 179. Notice and proofs must be served on the insurer at its office, or upon some managing or general agent. Service on a local agent is insufficient.

Notice and proofs are served upon the insurer only when they are delivered to it at its home office, or to some general or managing agent, or to some agent or officer expressly or impliedly authorized to receive them. Service according to the terms of the policy is always sufficient; likewise service upon any agent of limited powers provided they are forwarded to the insurer before the expiration of the time fixed for their service. Any service, however imperfect, which the insurer acquiesces in and acts upon, is sufficient.²⁴⁰

The provisions of a policy requiring notice of loss to be given to the secretary of the insurer in writing, is complied with by giving notice to the company itself.²⁴¹ Notice given to a director of an insurance company is not compliance with a provision requiring it to be given to the "secretary or some authorized officer."²⁴² If the policy requires notice to be

^{239b} *Lovejoy v. Hartford Fire Ins. Co.*, 11 Fed. 63. See, also, *Girard F. & M. Ins. Co. v. Field*, 45 Pa. St. 129. Compare *Martz v. Detroit F. & M. Ins. Co.*, 28 Mich. 201.

²⁴⁰ *Minneapolis, St. Paul & S. S. M. Ry. Co. v. Home Ins. Co.*, 64 Minn. 69; *Travellers' Ins. Co. v. Edwards*, 122 U. S. 457; *Rokes v. Amazon Ins. Co.*, 51 Md. 512, and cases *infra*; *German Ins. Co. v. Ward*, 90 Ill. 550; *Badger v. Phoenix Ins. Co.*, 49 Wis. 396.

²⁴¹ *Lewis v. Burlington Ins. Co.*, 80 Iowa, 259, 45 N. W. 749; *Scheiderer v. Travelers' Ins. Co.*, 58 Wis. 13, 16 N. W. 47; *Herron v. Peoria M. & F. Ins. Co.*, 28 Ill. 235; *Excelsior Mut. Aid Ass'n v. Riddle*, 91 Ind. 85.

²⁴² *Inland Insurance & Deposit Co. v. Stauffer*, 33 Pa. St. 397.

given to the secretary of the company, notice given to another agent is insufficient.²⁴³ A provision for notice to be sent "to the company at Hartford," and proofs "to be furnished," does not require that the proofs shall be sent to Hartford.²⁴⁴ Service made upon an adjusting agent who has had charge of the loss, is good if he forwards them to the company and no other or further proofs are demanded.²⁴⁵ Service upon any agent who forwards them to his principal is good.^{245a}

Proofs of loss under a Lloyd's policy are properly served at the office of the association on persons openly allowed to hold themselves out as its authorized attorneys in fact, notwithstanding great irregularity in their appointment.²⁴⁶ Service on its general agent is service on the insurer.²⁴⁷

Under the provisions of an application for insurance that any claim under the policy must be made at the company's home office or (at the option of the company) at the general agency through which the policy was issued, notice given

²⁴³ *Rokes v. Amazon Ins. Co.*, 51 Md. 512; *Connell v. Milwaukee Mut. Fire Ins. Co.*, 18 Wis. 407.

²⁴⁴ *Scheiderer v. Travelers' Ins. Co.*, 58 Wis. 13.

²⁴⁵ *Brock v. Des Moines Ins. Co.*, 106 Iowa, 30, 75 N. W. 683.

^{245a} *Argall v. Old North State Ins. Co.*, 84 N. C. 355; *Milwaukee Mechanics' Ins. Co. v. Winfield*, 6 Kan. App. 527, 51 Pac. 567; *Willis v. Germania Fire Ins. Co.*, 79 N. C. 285; *Loeb v. American Cent. Ins. Co.*, 99 Mo. 50; *Watertown Fire Ins. Co. v. Grover & B. Sewing Machine Co.*, 41 Mich. 131, 1 N. W. 961; *Brink v. Hanover Fire Ins. Co.*, 70 N. Y. 593; *Hibernia Mut. Fire Ins. Co. v. Meyer*, 39 N. J. Law, 482; *Travellers' Ins. Co. v. Edwards*, 122 U. S. 457.

²⁴⁶ *Ralli v. White*, 21 Misc. Rep. 285, 47 N. Y. Supp. 197.

²⁴⁷ *Insurance Co. of North America v. McLimans*, 28 Neb. 653, 44 N. W. 991; *North British & Mercantile Ins. Co. v. Crutchfield*, 108 Ind. 518; *Brink v. Hanover Fire Ins. Co.*, 70 N. Y. 593.

Where the policy stipulates that proofs shall be given to the company at its office or to an agent in the state, proof made to a general adjuster of a foreign company who is engaged in adjusting that particular loss is sufficient without also making it to the home office. *Merchants' & Mechanics' Ins. Co. v. Vining*, 67 Ga. 661.

to any general agent of the insurer is sufficient.²⁴⁸ A requirement that "notice shall be given to the secretary of the company within twenty days after loss or damage," is not complied with by giving verbal notice to the local agent within that time, and after the expiration of the twenty days giving written notice to the secretary.²⁴⁹ Both reason and the weight of authority deny the validity of service of either notice or proofs of loss upon a merely local agent, when the policy requires service to be made upon the insurer.²⁵⁰

In 1883, Pennsylvania passed a law to the effect that notice and proofs of loss may be given to an insurer at its general office or to the agent who countersigns the policy. Prior to that time service on local agents was held not good in that

²⁴⁸ *Pennington v. Pacific Mut. Life Ins. Co.*, 85 Iowa, 468, 52 N. W. 482.

²⁴⁹ *Connell v. Milwaukee Mut. Fire Ins. Co.*, 18 Wis. 407.

²⁵⁰ *Ermentrout v. Girard F. & M. Ins. Co.*, 63 Minn. 311; *Lohnes v. Insurance Co. of North America*, 121 Mass. 439; *Smith v. Niagara Fire Ins. Co.*, 60 Vt. 682; *Bush v. Westchester Fire Ins. Co.*, 63 N. Y. 531; *Edwards v. Lycoming Co. Mut. Ins. Co.*, 75 Pa. St. 378; *Engelbretson v. Hekla Fire Ins. Co.*, 58 Wis. 301. See post, "Who Can Waive Proofs." See, also, on this question, *Insurance Co. of North America v. McDowell*, 50 Ill. 120; *Rokes v. Amazon Ins. Co.*, 51 Md. 512; *Excelsior Mut. Aid Ass'n v. Riddle*, 91 Ind. 84; *Young v. Travelers' Ins. Co.*, 80 Me. 244; *Hartford Fire Ins. Co. v. Smith*, 3 Colo. 422; *Bennett v. Maryland Fire Ins. Co.*, 14 Blatchf. 422, Fed. Cas. No. 1,321; *North British Ins. Co. v. Crutchfield*, 108 Ind. 518; *Greenlee v. Iowa State Ins. Co.*, 102 Iowa, 260; *Fisher v. Crescent Ins. Co.*, 33 Fed. 544; *McCullough v. Phoenix Ins. Co.*, 113 Mo. 607.

But an insurance company cannot take advantage of the failure of insured to furnish proofs of loss, where such failure was due to the action of the agent of the company who issued the policy, in taking advantage of the ignorance or the inability of the assured to read. *McGuire v. Hartford Fire Ins. Co.*, 7 App. Div. 575, 40 N. Y. Supp. 300, even though the policy may contain express restrictions on the agent's powers, *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131; *Fire Ass'n of Philadelphia v. Jones* (Tex. Civ. App.), 40 S. W. 44.

state.²⁵¹ Where a policy is issued by two companies under a joint name, providing for several liability, and notice of loss to each, it is sufficient to furnish the notice to the secretary of the joint business.²⁵²

MANNER OF SERVICE.

§ 180. Notice or proofs of loss are not served upon the insurer until they are actually received by it. If the policy requires service upon the insurer at a particular place, that condition must be observed. The law presumes that letters properly addressed, stamped and mailed will reach their destination in the due course of mail service.

One of the purposes of the stipulations of a policy concerning notice and proofs is to provide the insurer with actual knowledge of the designated facts, and this the insured usually obligates himself absolutely to do. Though unrestricted in his choice of means of doing it—save as particularly specified in the policy itself—the risk of a failure is wholly his and not that of the insurer. Nothing less than actual reception by the insurer, within the time limited, of the prescribed information will satisfy the ordinary requirements of the contract in this regard. As a matter of evidence, proof that a letter properly addressed to the insurer at its usual place of business, with postage prepaid, was duly mailed, will raise a presumption that it was carried by due course of mail and was delivered and received in the usual and regular time of postal communication between the place of sending and the place to which the letter was addressed. But this is a mere presumption of fact liable to be rebutted or overcome by evidence that the letter was never in fact received. And if the

²⁵¹ *Welsh v. London Assur. Corp.*, 151 Pa. St. 607; *Trask v. State F. & M. Ins. Co.*, 29 Pa. St. 198.

²⁵² *Minnock v. Eureka F. & M. Ins. Co.*, 90 Mich. 236, 51 N. W. 367; *Bernero v. South British & Nat. Ins. Co.*, 65 Cal. 386.

evidence be conflicting as to whether the letter was received, or as to the date of its receipt, these questions must be determined as any other questions of fact.²⁵³ So where a policy requires that the proofs of loss shall be given to the insurer in the city of its residence or in which it has its principal place of business, the mailing to the insurer of proofs which are never received is not a compliance with the conditions.²⁵⁴ And a mistake of the insured in misdirecting proofs of loss mailed by him to the company, resulting in the company not receiving the proofs until after the expiration of the period within which they were required to be furnished, is fatal to his right to recover on the policy.²⁵⁵

The mailing of proofs of loss within sixty days has been held a substantial compliance with a condition of a policy that the insured shall "render a statement to the company" within such time.²⁵⁶ A registered letter duly sent and tendered to the addressee, who refuses to receive it, must be considered to have reached him.²⁵⁷

PROOFS AS EVIDENCE.

§ 181. Statements contained in proofs of loss are not always conclusive upon the claimant. They are not evidence in his favor. They may be used by the insurer as evidence in the nature of admissions against the claimant.

²⁵³ Pennypacker v. Capital Ins. Co., 80 Iowa, 56, 45 N. W. 408; Dade v. Aetna Ins. Co., 54 Minn. 337; British & American Tel. Co. v. Colson, L. R. 6 Exch. 108; Susquehanna Mut. Fire Ins. Co. v. Tunkhannock Toy Co., 97 Pa. St. 424; Engebretson v. Hekla Fire Ins. Co., 58 Wis. 301; Hodgkins v. Montgomery Co. Mut. Ins. Co., 34 Barb. 213, 41 N. Y. 620; Badger v. Glens Falls Ins. Co., 49 Wis. 389, 5 N. W. 845.

²⁵⁴ Central City Ins. Co. v. Oates, 86 Ala. 559.

²⁵⁵ Maddox v. Dwelling House Ins. Co., 56 Mo. App. 343. See as to computation of time, Badger v. Glens Falls Ins. Co., 49 Wis. 389, 5 N. W. 845.

²⁵⁶ Manufacturers' & M. Mut. Ins. Co. v. Zeiting, 168 Ill. 286, 48 N. E. 179.

²⁵⁷ American Cent. Ins. Co. v. Simpson, 43 Ill. App. 98.

The proofs of loss stipulated for in an insurance policy are no part of the contract of insurance, nor do they of themselves create any liability in favor of the insured nor against the insurer. They merely serve to fix the time or circumstances under which a loss shall become payable and when an action may be maintained to enforce a liability. Proof of their service merely shows an actual or attempted compliance with the requirements of the policy.²⁵⁸ But a statement in the certificate of a magistrate that he is not interested in the loss is *prima facie* evidence of the fact of his disinterestedness.²⁵⁹ Secondary evidence of the contents of proof of loss is admissible, when the defendant, having possession of the original, fails to produce it after notice to produce is properly given.²⁶⁰ Representations made in proofs of loss or death as to the manner and attending circumstances are intended for the information of the insurance company, which has a right to rely upon their truth; and the party making them must be held to them, until it is shown that they were made under misapprehension of the facts or in ignorance of material matters subsequently ascertained. The true rule upon this subject is that statements contained in proofs of loss concerning material matters are binding and conclusive upon the party who makes them, until by pleading, or otherwise, he gives the insurance company reasonable notice that he was mistaken in his statements and that he will endeavor to show that the death or loss was the result of a different cause or that surrounding circumstances were different from those stated in the proofs. After the insurance company has had due notice of these facts and this intention, the proofs have the probative force of solemn admissions under oath against

²⁵⁸ Rheims v. Standard Fire Ins. Co., 39 W. Va. 672.

²⁵⁹ Cornell v. Le Roy, 9 Wend. (N. Y.) 163.

²⁶⁰ Union Ins. Co. v. Smith, 124 U. S. 405.

interest, but they are not conclusive.²⁶¹ Thus, an incorrect statement of facts inadvertently made by the insured in his proofs of loss may be corrected and explained by the parol testimony upon the trial of the case, where the same explanation has been given in substance by the insured to the insurer prior to the institution of the suit.²⁶² And where a policy requires the furnishing of proofs of death of the insured, but does not state what such proofs must contain, a claimant is not bound by the statements made in his proofs as to the cause and manner of death. Such statements are evidence in the

²⁶¹ *Travelers' Ins. Co. v. Melick* (C. C. A.), 65 Fed. 178; *Cochran v. Mutual Life Ins. Co.*, 79 Fed. 46; *Insurance Co. v. Newton*, 22 Wall. (U. S.) 32; *Keels v. Mutual Reserve Fund Life Ass'n*, 29 Fed. 198; *McMaster v. Insurance Co. of North America*, 55 N. Y. 222; *Parmelee v. Hoffman Fire Ins. Co.*, 54 N. Y. 193; *Campbell v. Charter Oak F. & M. Ins. Co.*, 10 Allen (Mass.), 213; *Irving v. Excelsior Fire Ins. Co.*, 1 Bosw. (N. Y.) 507.

In *Campbell v. Charter Oak F. & M. Ins. Co.*, supra, there was a misstatement of fact in the proofs, which showed the policy forfeited. The supreme court of Massachusetts said: "A true statement [of the conditions] was called for by the * * * policy. It was a condition precedent to the liability to be called upon to pay the loss. If this be rejected as being a false statement, then no statement has been filed, and for that reason the plaintiff cannot recover. If allowed to stand as a part of the statement, the policy had been avoided. * * * The defendants might properly rely upon the statement of the insured formally made under the provisions in the policy, at least until notice of such mistake; and an amendatory statement ought to be filed before instituting an action upon the policy. * * * We do not mean to say that the party may not correct mistakes of fact in his original statement, but such corrections are not for the first time to be made known to the insurers at the trial of the action to recover for the loss by the introduction of evidence showing that the statements filed were not true in a material fact, which, if it existed as stated, was fatal to the right of the insured to recover." *West v. British America Assur. Co.* (U. S. Cir. Ct.), 25 Ins. Law J. 689.

²⁶² *Hanover Fire Ins. Co. v. Lewis*, 28 Fla. 209, 10 So. 297; *Fisher v. Fidelity Mut. Life Ass'n*, 188 Pa. St. 1; *Waldock v. Springfield F. & M. Ins. Co.*, 53 Wis. 129.

nature of admissions against the claimant, but when made under an honest misapprehension of the facts may be explained, and the true facts may be shown. When no evidence is offered to contradict the statements in the proofs, they are taken as conclusive against the claimant. They are not evidence in his favor.²⁶³ An honest mistake of the insured in stating in his proofs of loss that the fire originated from the use of benzine, does not prevent him upon the trial from producing evidence of the actual facts and explaining the mistake and the reasons for it.²⁶⁴

Proofs of loss stating suicide as the cause of death, although admissible to show the fact of their service, are not conclusive against the plaintiff in an action on a life insurance policy.²⁶⁵ One may show that the loss was greater or less than stated in the proofs, and that it embraced articles not included therein, unless by his acts, conduct or declarations, it is against good conscience that he should be permitted to show the truth, or unless otherwise stipulated in the policy. In order to pre-

²⁶³ *Beckett v. Northwestern Masonic Aid Ass'n*, 67 Minn. 298; *National Life Ass'n v. Sturtevant*, 78 Hun (N. Y.), 572; *Schmitt v. National Life Ass'n*, 84 Hun (N. Y.), 128; *Cole v. Manchester Fire Assur. Co.*, 188 Pa. St. 345; *Travelers' Ins. Co. v. Melick* (C. C. A.), 65 Fed. 178; *Hanna v. Connecticut Mut. Life Ins. Co.*, 150 N. Y. 526; *Hiles v. Hanover Fire Ins. Co.*, 65 Wis. 535.

²⁶⁴ *White v. Royal Ins. Co.*, 8 Misc. Rep. 613, 29 N. Y. Supp. 323; *Enos v. St. Paul F. & M. Ins. Co.*, 4 S. D. 639, 57 N. W. 919; *Republic Fire Ins. Co. v. Weides*, 14 Wall. (U. S.) 375; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Balestracci v. Firemens' Ins. Co.*, 34 La. Ann. 844; *Farmers' Mut. Fire Ins. Co. v. Gargett*, 42 Mich. 289; *Jersey City Ins. Co. v. Nichol*, 35 N. J. Eq. 291; *Schuster v. Dutchess County Ins. Co.*, 102 N. Y. 260.

²⁶⁵ *Leman v. Manhattan Life Ins. Co.*, 46 La. Ann. 1189, 24 L. R. A. 589; *Travelers' Ins. Co. v. Melick*, 27 U. S. App. 547, 65 Fed. 178, 27 L. R. A. 629; *John Hancock Mut. Life Ins. Co. v. Dick*, 117 Mich. 518, 76 N. W. 9, 44 L. R. A. 846. (The notes given by the editor of the *Lawyers' Reports Annotated* to this last case are very full and complete.)

clude him, the opposite party must have done some act or changed his situation in reliance upon the statement or conduct of the party to be estopped.²⁶⁶ But if the insured, with intent to defraud the insurer, overstates the amount of the loss, he will be bound by his proofs, and under many policies will forfeit all his rights.²⁶⁷

The affidavits of the attending physicians as to the cause of death of one insured, made on blanks furnished by the insurer and forwarded with proofs of death, do not conclude the beneficiary as to the cause of death.²⁶⁸ And it has even been held that the statements of the attending physician furnished with proofs of death according to the terms of the policy, are not evidence in favor of either party in an action upon the policy; and this upon the ground that the insured was compelled by the policy to furnish a certificate, and in complying with that requirement of the policy he did not vouch for the absolute truth of the opinions or ideas of the physician, and that statements made by the physician stood upon a different footing from the statements made by the claimant himself.²⁶⁹ Statements in proofs of death made by the physician of the insured as to previous complaints and ailments of the insured are "privileged communications" within the statutory definition of that term, and are not admissible to show that the answers made by the insured to certain

²⁶⁶ *Schmidt v. City & Village Fire Ins. Co.*, 55 Mich. 432, 21 N. W. 877; *Corkery v. Security Fire Ins. Co.*, 99 Iowa, 382, 68 N. W. 792; *Town v. Springfield F. & M. Ins. Co.*, 145 Mass. 582; *Rafel v. Nashville M. & F. Ins. Co.*, 7 La. Ann. 244; *Crittenden v. Springfield F. & M. Ins. Co.*, 85 Iowa, 652; *Aetna Ins. Co. v. Stevens*, 48 Ill. 31; *Young v. Travelers' Ins. Co.*, 80 Me. 244.

²⁶⁷ *Sleeper v. N. H. F. Ins. Co.*, 56 N. H. 401; *Huchberger v. Home Fire Ins. Co.*, 5 Biss. 106, Fed. Cas. No. 6,821; cases cited *supra*. See also, post, § 182, "False Swearing."

²⁶⁸ *Bentz v. Northwestern Aid Ass'n*, 40 Minn. 202, 2 L. R. A. 784.

²⁶⁹ *Helwig v. Mutual Life Ins. Co.*, 58 Hun (N. Y.), 366.

questions in his application for the insurance were false, but they are competent evidence as an admission by plaintiff of the cause of death of the insured; beyond this, they do not bind him.²⁷⁰ A condition in a policy of life insurance that all the contents of the proof of death furnished to the company shall be evidence of the facts therein stated in behalf of the company but not against it, is valid, and the statements of the physician made in proofs furnished under such a policy are evidence against the party furnishing the proofs, and are not subject to the objection that they are privileged statements.²⁷¹

FRAUD, MISREPRESENTATIONS, AND FALSE SWEARING.

§ 182. An honest misstatement of facts in proofs of loss does not prevent a recovery.

False and fraudulent statements and misrepresentations made by a claimant in his proofs of loss will defeat recovery only when such a result is stipulated for in the policy.

Whether mistakes were made honestly or with fraudulent intent is to be determined as a question of fact.

Fraudulent statements and overvaluation do not usually affect the rights of a claimant under a valued policy covering only realty; even though the policy provides for forfeiture for fraud or false swearing.

Generally.

False and fraudulent statements or representations contained in proofs of loss furnished in accordance with the conditions of the policy, do not forfeit the rights of the insured

²⁷⁰ Dreier v. Continental Life Ins. Co., 24 Fed. 670. See, also, Redmond v. Industrial Ben. Ass'n, 78 Hun (N. Y.), 105; Connecticut Mut. Life Ins. Co. v. Siegel, 9 Bush (Ky.), 450; Day v. Mutual Ben. Life Ins. Co., 1 MacArthur, D. C. 598; Davey v. Aetna Life Ins. Co., 29 Fed. 482.

²⁷¹ Proppe v. Metropolitan Life Ins. Co., 13 Misc. Rep. 266, 34 N. Y. Supp. 172; Howard v. Metropolitan Life Ins. Co., 18 Misc. Rep. 74, 41 N. Y. Supp. 33.

unless the policy so provides. Perjury or fraud of a claimant subsequent to the making of the contract does not operate retrospectively to destroy its original validity unless so stipulated.²⁷² But it has been held, that where the insured is required to furnish a true statement of and concerning his loss as a condition precedent to any liability on the part of the insurer, the furnishing of such a statement is imperative, and that if the statement furnished be rejected as false, the plaintiff cannot recover.²⁷³ Many policies provide that any fraud, or attempt at fraud, or any misrepresentations in proofs of loss or in examination of the claimant under oath, or any false swearing, will work a forfeiture of all claims. Of this kind of policies I now speak. These provisions are reasonable and valid. Their effect is to create conditions subsequent insuring to the benefit of the insurer, upon whom it devolves to plead the existence of the provisions (if they do not already appear from the pleadings of the adversary) and to prove the facts which make them operative. Whether any of such provisions have been violated is to be determined as a question of fact. The defense of false swearing or fraud is not established unless it appears that the statement made was false and was made with knowledge that it was false and with intent thereby to defraud. A false answer as to any material matter, knowingly and wilfully made, with intent to deceive the insurer, would be fraudulent. And if the matter were material and the statement false, to the knowledge of the party making it, and were wilfully made, the intention to deceive the insurer will be conclusively presumed. Where one has made a

²⁷² *Phœnix Ins. Co. v. Moog*, 78 Ala. 284; *Bowen v. National Life Ass'n*, 63 Conn. 460.

²⁷³ *Campbell v. Charter Oak F. & M. Ins. Co.*, 10 Allen (Mass.), 218. See ante, note 261. *Irving v. Excelsior Fire Ins. Co.*, 1 Bosw. (N. Y.) 507. See ante, "Proofs, as Evidence."

false representation or statement knowing it to be false, the law infers that he did it with the intention to deceive.²⁷⁴ In the absence of any stipulation to the contrary, all rights of a mortgagee or other person holding a beneficial interest in the policy are governed by the same conditions as the rights of the insured.²⁷⁵ There can be no recovery on a policy of insurance issued to several persons jointly, where one of them, in violation of its conditions, made false statements in the proofs of loss upon which the right of recovery is based.²⁷⁶

Where a policy provides that it shall be void in case of the fraud or false swearing of the insured touching any matter relating to the insurance or the subject thereof, whether before or after the loss, the wilful false swearing by the insured to a material matter on his examination before a notary public or magistrate after a loss, forfeits the whole amount due and not merely the amount due on a particular item of damage or for the loss of a particular article to which the false statement relates.²⁷⁷ Fraud which does not come within the

²⁷⁴ *Claffin v. Commonwealth Ins. Co.*, 110 U. S. 81; *Lord v. Goddard*, 13 How. (U. S.) 198; *Dohmen Co. v. Niagara Fire Ins. Co.*, 96 Wis. 38, 71 N. W. 69; *Hammatt v. Emerson*, 27 Me. 308-326; *Mack v. Lancashire Ins. Co.*, 2 McCrary, 211, 4 Fed. 59; *Worachek v. New Denmark Mut. Home Fire Ins. Co.*, 102 Wis. 88, 78 N. W. 411; *Knop v. National Fire Ins. Co.*, 107 Mich. 323, 65 N. W. 229; *Mullin v. Vermont Mut. Fire Ins. Co.*, 58 Vt. 113; *Watertown Fire Ins. Co. v. Grehan*, 74 Ga. 642; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Merrill v. Insurance Co. of North America*, 23 Fed. 245; *Leach v. Republic Fire Ins. Co.*, 58 N. H. 245, and cases *infra*. See, also, "Examination under Oath."

²⁷⁵ *Lewis v. Council Bluffs Ins. Co.*, 63 Iowa, 193, 18 N. W. 888.

²⁷⁶ *Monaghan v. Agricultural Fire Ins. Co.*, 53 Mich. 238, 18 N. W. 797.

²⁷⁷ *Hamberg v. St. Paul F. & M. Ins. Co.*, 68 Minn. 335, 71 N. W. 388; *Worachek v. New Denmark Mut. Home Fire Ins. Co.*, 102 Wis. 88, 78 N. W. 411; *Moore v. Virginia F. & M. Ins. Co.*, 28 Grat. (Va.) 508; *Oshkosh Packing & Provision Co. v. Mercantile Ins. Co.*, 31 Fed. 200.

conditions of the policy cannot affect the insurer's liability—as an attempt to bribe its inspector and builder.²⁷⁸

A policy requiring the insured to state in his proofs of loss all other insurance, whether valid or not, covering any of the property, and providing that it shall be void in case of any fraud or false swearing by the insured, is not avoided by the omission from the proofs of loss of a policy, where he had been informed a few days before the loss by the company issuing it that it had gone into liquidation and recalled all policies for cancellation, and the insured at once procured other insurance and notified the other company of such fact, although the policies had not in fact been marked cancelled.²⁷⁹

If the insured knowingly and with intent to defraud makes a false and exaggerated statement in his proofs as to the quantity and value of the property destroyed or damaged, he forfeits his rights to recover. While arithmetical accuracy is not required, the truth, the whole truth and nothing but the truth must be disclosed, as nearly as it can be ascertained by a

²⁷⁸ *Daul v. Firemens' Ins. Co.*, 35 La. Ann. 98; *Bowen v. National Life Ass'n*, 63 Conn. 460. A false statement which could not deceive the insurer to its injury will not always cause a forfeiture. *Shaw v. Scottish Commercial Ins. Co.*, 1 Fed. 761; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Mullin v. Vermont Mut. Fire Ins. Co.*, 58 Vt. 113; *German Ins. Co. v. Luckett*, 12 Tex. Civ. App. 139, 34 S. W. 173; *Faulkner v. Manchester Fire Assur. Co.*, 171 Mass. 349; *Hanscom v. Home Ins. Co.*, 90 Me. 333; *Phoenix Ins. Co. v. Padgitt* (Tex. Civ. App.), 42 S. W. 800; *Springfield F. & M. Ins. Co. v. Winn*, 27 Neb. 649, 5 L. R. A. 841. (In the Nebraska case, it was held that a willful misrepresentation by insured as to the amount of his loss, provided the actual amount is in excess of the face of the policy, will not cause a forfeiture under a provision that "all fraud or attempts at fraud by false swearing or otherwise shall forfeit all claim on this company, and shall be a complete bar to any recovery for loss under this policy." This is contrary to the general trend of decisions.) But see *Worachek v. New Denmark Mut. Home Fire Ins. Co.*, 102 Wis. 88, 78 N. W. 411; *Home Ins. Co. v. Winn*, 42 Neb. 331, 60 N. W. 575.

²⁷⁹ *Gough v. Davis*, 24 Misc. Rep. 245, 52 N. Y. Supp. 947.

reasonable and honest effort.²⁸⁰ If there be a discrepancy between the amount of damage claimed in the proofs and that proved upon the trial, it is for a jury (in a jury trial) under proper instructions, to find whether the misstatement was the result of accident, mistake or fraudulent intent.²⁸¹ Under a policy which provides in effect that any over-valuation of property or false swearing in any affidavit relating to the loss shall forfeit the rights of the insured against the insurer, the policy is avoided by the claiming in the verified proofs that the value of the property destroyed was \$1,000 when the value as testified to at the trial was only \$450 and the jury found the property to be worth less than \$100.²⁸² So where the amount claimed was more than double the value fixed by appraisers and the jury.²⁸³ And where plaintiff in his proofs of loss made affidavit that the value of the property at the time of its destruction was \$1,000, understanding that the value was much less, although not less than \$600, the sum for which

²⁸⁰ *Sibley v. St. Paul F. & M. Ins. Co.*, 9 Biss. 31, Fed. Cas. No. 12,830; *Putnam v. Commonwealth Ins. Co.*, 18 Blatchf. 368, 4 Fed. 753; *Dolloff v. Phoenix Ins. Co.*, 82 Me. 266; *West v. British America Assur. Co.* (Cir. Ct. D. Colo.), 25 Ins. Law J. 689; *Home Ins. Co. v. Winn*, 42 Neb. 331, 60 N. W. 575; *Worachek v. New Denmark Mut. Home Fire Ins. Co.*, 102 Wis. 88, 78 N. W. 411.

²⁸¹ *Dolan v. Aetna Ins. Co.*, 22 Hun (N. Y.), 396; *Schulter v. Merchants' Mut. Ins. Co.*, 62 Mo. 236; *Tiefenthal v. Citizens' Mut. Fire Ins. Co.*, 53 Mich. 306, and cases supra; *Oshkosh Packing & Provision Co. v. Mercantile Ins. Co.*, 31 Fed. 200; *Furlong v. Agricultural Ins. Co.*, 28 Abb. N. C. 444, 18 N. Y. Supp. 844; *Obersteller v. Commercial Assur. Co.*, 96 Cal. 645, 31 Pac. 587; *Williams v. Phoenix Fire Ins. Co.*, 61 Me. 67; *Wunderlich v. Palatine Fire Ins. Co.*, 104 Wis. 382, 80 N. W. 467.

²⁸² *Furlong v. Agricultural Ins. Co.*, 28 Abb. N. C. 444, 18 N. Y. Supp. 844; *Sternfeld v. Park Fire Ins. Co.*, 50 Hun (N. Y.), 262; *Wall v. Howard Ins. Co.*, 51 Me. 32.

²⁸³ *Gastonguay v. Sovereign Fire Ins. Co.*, 3 Russ. & G. (Nova Scotia) 334; *Larocque v. Royal Ins. Co.*, 23 Low. Can. Jur. 217; *Har ris v. Waterloo Mut. Fire Ins. Co.*, 10 Ont. 718.

it was insured.²⁸⁴ And where plaintiff in his proofs states that a burned building had been used for dwelling house purposes and no other, when in fact it was occupied as a place for selling liquor and cigars, recovery cannot be had even though the agent of the insurer knew of the use to which the building was put.²⁸⁵

An innocent mistake or misstatement of fact, however material, or over-valuation, will not avoid a policy unless the insurer has been prejudiced.²⁸⁶ An untrue statement in proof of loss as to the claimant's interest is immaterial unless the policy requires a statement of such interest.²⁸⁷ The failure of the insured to refer in his proofs of loss or otherwise

²⁸⁴ *Sleeper v. N. H. F. Ins. Co.*, 56 N. H. 401; *Mullin v. Vermont Mut. Fire Ins. Co.*, 58 Vt. 113; *Knop v. National Fire Ins. Co.*, 107 Mich. 323, 65 N. W. 229.

In *Mullin v. Vermont Mut. Fire Ins. Co.*, supra, the insured, in making out his proofs, relied upon information given by others, but stated the facts as of his own knowledge. The statements were false. The court said: "If he made representations assuming to know the facts when he had no knowledge, and such statements turned out to be false, it was a fraud, within the meaning of the policy." This law was approved in *Knop v. National Fire Ins. Co.*, supra. But see *Phoenix Ins. Co. v. Swann* (Tex. Civ. App.), 41 S. W. 519.

²⁸⁵ *Hansen v. American Ins. Co.*, 57 Iowa, 741; *Smith v. Queen Ins. Co.*, 1 Hann. (N. B.) 311.

²⁸⁶ *Commercial Ins. Co. v. Friedlander*, 156 Ill. 595; *Parker v. Amazon Ins. Co.*, 34 Wis. 363; *Mosley v. Vermont Mut. Fire Ins. Co.*, 55 Vt. 142; *Erb v. German American Ins. Co.*, 98 Iowa, 606, 40 L. R. A. 845; *Waldeck v. Springfield F. & M. Ins. Co.*, 53 Wis. 129; *Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Behrens v. Germania Fire Ins. Co.*, 64 Iowa, 19; *Smith v. Exchange Fire Ins. Co.*, 8 Jones & S. 492; *Oshkosh Packing & Provision Co. v. Mercantile Ins. Co.*, 31 Fed. 200; *Helbing v. Svea Ins. Co.*, 54 Cal. 156; *Fitzgerald v. Union Ins. Co.*, 54 Cal. 599; *Gere v. Council Bluffs Ins. Co.*, 67 Iowa, 272; *Pelican Ins. Co. v. Schwartz* (Tex.), 19 S. W. 374; *Israel v. Teutonia Ins. Co.*, 28 La. Ann. 689; *Dogge v. Northwestern Nat. Ins. Co.*, 49 Wis. 501; *Parsons v. Citizens' Ins. Co.*, 43 Up. Can. Q. B. 261; *Towne v. Springfield F. & M. Ins. Co.*, 145 Mass. 582; *Hanscom v. Home Ins. Co.*, 90 Me. 333.

²⁸⁷ *Bowen v. National Life Ass'n*, 63 Conn. 460.

to the lien of his lessor for rent upon the building insured does not avoid the policy under the clause that it should become void "by fraud or attempt at fraud in the procurement of this policy or in the proofs of loss or by false swearing or by any other means," even though the policy further required the insured to furnish proofs of loss stating the title and interest of himself and all others in the property. There must be more than a mistake of fact or honest misstatement to amount to fraud or false swearing.²⁸⁸ A statement made by the insured in his proofs of loss that the amount claimed of the insurer was \$1,450, the whole amount of the loss, without giving information of an assignment, is not a false statement or fraudulent claim where the insured had on the day of the loss assigned an interest in the policy to another. Otherwise if the proofs contained a statement or claim that the whole amount was due to the insured.²⁸⁹

Under Valued Policies.

The fact that the insured knowingly and intentionally stated in his proofs of loss that the amount of the loss was greater than it actually was, is no defense to an action on a valued policy on realty alone—even though it contain a provision that all claims should be forfeited by "fraud or attempt at fraud by false swearing or otherwise." But where the same policy covers both realty and personalty and the amount of damage to the latter is in dispute—any fraudulent over-valuation of either in proofs of loss may be considered by a jury

²⁸⁸ *Dresser v. United Firemen's Ins. Co.*, 45 Hun (N. Y.), 298; *Star Union Lumber Co. v. Finney*, 35 Neb. 214; *Huff v. Jewett*, 20 Misc. Rep. 35, 44 N. Y. Supp. 311; *Faulkner v. Manchester Fire Assur. Co.*, 171 Mass. 349; *Little v. Phoenix Ins. Co.*, 123 Mass. 380; *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Rohrbach v. Aetna Ins. Co.*, 62 N. Y. 613; *Wash v. Fire Ass'n of Philadelphia*, 127 Mass. 383.

²⁸⁹ *Lamb v. Council Bluffs Ins. Co.*, 70 Iowa, 238, 30 N. W. 497.

in determining whether the statements made concerning personalty were fraudulent or not.²⁹⁰

EXAMINATION UNDER OATH.

§ 183. The insured need not submit to an examination under oath unless he has bound himself to do so, and then only to one examination, at a convenient place, and after a proper demand has been made upon him.

Under a stipulation in a policy that the assured shall, if required, submit himself to an examination under oath, mere informal conversations or declarations by the officers of the company that they desired to have such an examination will not impose any duty upon the insured. He is not obliged to tender himself voluntarily for examination. A demand for such examination must be made with such clearness and distinctness that the insured shall be fully informed that the insurer means to insist upon it.²⁹¹ Whether the conditions of a policy requiring an examination of the insured and his book accounts are waived by delay on the part of the insurer in demanding the same and in taking part in an adjustment of the loss during which the books were examined and the amount of the damage practically agreed upon is often a question for a jury to determine.²⁹² And where a provision requires the insured to submit to an examination under oath by any person named by the company, the latter must designate someone authorized by law to administer oaths, before whom such examination can be had, and fix a time for the examination within a reasonable date after it has notice of the fire, and a

²⁹⁰ *Oshkosh Packing & Provision Co. v. Mercantile Ins. Co.*, 31 Fed. 200; *Cayon v. Dwelling House Ins. Co.*, 68 Wis. 510, 32 N. W. 540; *Seyk v. Millers' Nat. Ins. Co.*, 74 Wis. 67, 3 L. R. A. 523; *Bammessel v. Brewers' Fire Ins. Co.*, 43 Wis. 463.

²⁹¹ *State Ins. Co. v. Maackens*, 38 N. J. Law, 565.

²⁹² *Robertson v. New Hampshire Ins. Co. (Super. Ct.)*, 16 N. Y. Supp. 842.

place of examination reasonably convenient within the county where the insured resides, before such provision becomes operative. Where the insured submits to one examination and that is concluded, the insurer can demand no more unless by the terms of the policy.²⁹³

An insurer cannot require the insured to leave the state where he resides and where the fire occurs, and appear at its office in another state, there to be examined concerning the loss.²⁹⁴

The insured has a right to the presence of counsel at his examination, and the denial of this right by the insurer justifies the insured in refusing to submit to an examination.²⁹⁵ The validity of any condition requiring the insured to submit to a secret examination, and denying him the right to the assistance of counsel, is doubtful.²⁹⁶

Where a policy requires the insured to submit to an examination under oath concerning the loss, and further provides that actual or attempted fraud or false swearing shall destroy all rights to recover on the policy, a false answer knowingly and wilfully made by the insured during such an examination as to a matter of fact material to the inquiry, is fraudulent, and the intent to deceive the insurer is necessarily implied; and it is no palliation of the fraud that the insured did not mean thereby to prejudice the insurer, but meant merely to promote his own personal interests in other matters. Such false statements wilfully made during such an examination

²⁹³ *Aetna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125; *Moore v. Protection Ins. Co.*, 29 Me. 97; *McKee v. Susquehanna Mut. Fire Ins. Co.*, 135 Pa. St. 544, 19 Atl. 1067; *Woodfin v. Asheville Mut. Ins. Co.*, 6 Jones (N. C.), 558; *Germania Fire Ins. Co. v. Curran*, 8 Kan. 9.

²⁹⁴ *American Cent. Ins. Co. v. Simpson*, 43 Ill. App. 98; *Fleisch v. Insurance Co. of North America*, 58 Mo. App. 596, 23 Ins. Law J. 634.

²⁹⁵ *Thomas v. Burlington Ins. Co.*, 47 Mo. App. 169; *American Cent. Ins. Co. v. Simpson*, 43 Ill. App. 98.

²⁹⁶ *McGraw v. German Fire Ins. Co.*, 54 Mich. 145, 19 N. W. 927.

and intended to conceal the truth in regard to the purchase of the property insured, or price paid, or the manner of payment, constitute an attempted fraud by false swearing, which is a breach of the condition and a bar to recovery on the policy.²⁹⁷

The wilful false swearing by the insured to a material matter under such provisions forfeits the whole amount due, and not merely the amount due on a particular item of damage, or for the loss of a particular article, to which the false statement relates.²⁹⁸ The insured is bound in such an examination to answer only those questions which have a material bearing upon the insurance and the loss, and his refusal to answer questions having no such bearing cannot prejudice.²⁹⁹ He is not bound to answer questions respecting the amount for which he had made a settlement with other insurance companies, nor on a demand to produce certified copies of invoices of goods destroyed need he produce duplicates where the originals are destroyed or are out of his possession.³⁰⁰

A condition that the insured, "if required, shall produce the books of account and other proper vouchers and permit copies of invoices to be taken therefrom," does not require him to produce any books or papers which are not under his personal control.³⁰¹ Where a policy requires the insured to submit to an examination under oath by the agent of the insurer and to subscribe to the same, and the insured does submit to an examination but does not subscribe to the same because he claims it to be incorrect, and no further demand for his subscription is made by the insurer, this alone will not bar an action on the policy, but the burden is on the insured to

²⁹⁷ *Claffin v. Commonwealth Ins. Co.*, 110 U. S. 81.

²⁹⁸ *Hamberg v. St. Paul F. & M. Ins. Co.*, 68 Minn. 335.

²⁹⁹ *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 411.

³⁰⁰ *Republic Fire Ins. Co. v. Weides*, 14 Wall. (U. S.) 375.

³⁰¹ *Sagers v. Hawkeye Ins. Co.*, 94 Iowa, 519, 63 N. W. 194.

show that he was justified in not signing.³⁰² Any objection which the insurer might make because of the failure to furnish or of delay in furnishing notice or proofs of loss, is waived by its insistence upon the right to examine the insured under oath concerning the loss.³⁰³

The insurer waives its right to declare a policy forfeited for failure of the insured to comply with an "iron-safe" clause therein by requiring the insured to submit to a sworn examination under a stipulation therefor in the policy.³⁰⁴ But a provision in a policy requiring the insured to exhibit to the company's adjuster all that remains of the property insured after a loss occurs, is not waived by an examination of the secretary and treasurer of the insured after furnishing of proofs of loss, where the policy specifically provides that no waiver shall arise in consequence of such examination.³⁰⁵

BOOKS OF ACCOUNT, INVOICES, ETC.

§ 184. The insured must keep such books of account and invoices as are prescribed by the policy.

After a loss he must upon proper demand produce such data as is required by the policy or show a legal excuse for his failure so to do.

An insurance company has the right to require by its policies that one whom it insures and who is carrying on a mercantile business, shall take inventories of stock at stated intervals and keep books of account showing purchases and sales, and that he shall keep such inventories and books in a secure place, ready to be produced in case of damage by fire, so that

³⁰² *Scottish U. & N. Ins. Co. v. Keene*, 85 Md. 265. See, also, *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131, 17 N. W. 726.

³⁰³ *Carpenter v. German American Ins. Co.*, 135 N. Y. 298; *Badger v. Glens Falls Ins. Co.*, 49 Wis. 389.

³⁰⁴ *Georgia Home Ins. Co. v. O'Neal*, 14 Tex. Civ. App. 516, 38 S. W. 62.

³⁰⁵ *Oshkosh Match Works v. Manchester Fire Assur. Co.*, 92 Wis. 510, 66 N. W. 525.

the amount and extent of the loss can be accurately and readily ascertained. And when the policy requires the insured to comply with such requirement if requested so to do or show a loss, if requested, under penalty of forfeiture, he must comply with such requirement if requested so to do or show a legal excuse for non-compliance. Otherwise he cannot recover except the insurer has waived or is estopped to insist upon its rights in that particular. The fact that he did not keep any books of account will not excuse his failure to comply with these conditions.³⁰⁶

A provision that he shall, after loss, as often as required produce for examination by the insurer all books of account, bills and invoices or certified copies thereof if the originals are lost, at such reasonable place as may be designated by the company or its representatives, and shall permit extracts from and copies thereof to be made, is reasonable, and it is the duty of the insured to comply with a demand made pursuant thereto. If insured is, under this clause, called upon to produce duplicate bills of articles contained in his statement of loss, and is unable so to do, the burden is on him to show that he made reasonable efforts to comply and was unsuccessful.³⁰⁷ The insured can ordinarily only be compelled to

³⁰⁶ *Niagara Fire Ins. Co. v. Forehand*, 169 Ill. 626. See, also, ante, "Particular Account;" *Norton v. Rensselaer & S. Ins. Co.*, 7 Cow. (N. Y.) 645, 1 Bennett, *Fire Ins. Cas.* 204; *O'Brien v. Commercial Fire Ins. Co.*, 63 N. Y. 108-113; *Ward v. National Fire Ins. Co.*, 10 Wash. 361. As to nature of the books required, see *Pelican Ins. Co. v. Wilkerson*, 53 Ark. 353, 13 S. W. 1103; *Jones v. Mechanics' Fire Ins. Co.*, 36 N. J. Law, 35; *Republic Fire Ins. Co. v. Weides*, 14 Wall. (U. S.) 375.

³⁰⁷ *Langan v. Royal Ins. Co.*, 162 Pa. St. 357; *Jones v. Mechanics' Fire Ins. Co.*, 36 N. J. Law, 29; *Miller v. Hartford Fire Ins. Co.*, 70 Iowa, 704; *Meyer v. Insurance Co. of North America*, 73 Mo. App. 166.

In this case it was held that, under a valued policy, the insured

produce the books and papers under his personal control.³⁰⁸ The insurer should be prompt and reasonable in its demands.³⁰⁹

The fact that one of the conditions of a policy provides that proofs of loss shall be sustained, "if required, by books of account and other vouchers," creates no implied warranty on the part of the assured that he will keep books of account and other vouchers and be ready to exhibit them when called on.³¹⁰ The obligation imposed upon the insured by the terms of the policy to make a true inventory of the goods after a fire has occurred is excused if the goods are so damaged that it is not reasonably practical to make such an inventory.³¹¹

The production of books and inventories covenanted to be kept in a fireproof safe and produced in case of loss, is excused if they are destroyed by fire while in a safe which, though not absolutely fireproof, is composed of incombustible materials and fitted to protect its contents in the ordinary way and to the usual extent.³¹² The proper place for the examination of the books of the insured, provided for in a policy of insur-

could not be compelled to furnish plans and specifications of the building destroyed. To the same effect is *Phoenix Ins. Co. v. Levy*, 12 Tex. Civ. App. 45, 33 S. W. 992; but see *Temple v. Niagara Fire Ins. Co.*, 85 N. W. 361.

³⁰⁸ *Sagers v. Hawkeye Ins. Co.*, 94 Iowa, 519, 63 N. W. 194; *Republic Fire Ins. Co. v. Weides*, 14 Wall. (U. S.) 375.

³⁰⁹ *Aetna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125; *Moore v. Protection Ins. Co.*, 29 Me. 97; *McKee v. Susquehanna Mut. Fire Ins. Co.*, 135 Pa. St. 544; *American E. L. Ins. Co. v. Barr*, 16 C. C. A. 51, 63 Fed. 873; *Union Cent. Life Ins. Co. v. Hollowell*, 14 Ind. App. 611, 43 N. E. 277.

³¹⁰ *Wightman v. Western M. & F. Ins. Co.*, 8 Rob. (La.) 442, 2 Ben-
nett, Fire Ins. Cas. 331.

³¹¹ *Powers Dry Goods Co. v. Imperial Fire Ins. Co.*, 48 Minn. 380, 51 N. W. 123; *German Ins. Co. v. Pearlstone*, 18 Tex. Civ. App. 706, 45 S. W. 832.

³¹² *Sneed v. British America Assur. Co.*, 73 Miss. 279, 18 So. 928.

ance upon the merchandise in a store, is the place of its location in the absence of any stipulation to the contrary.³¹³ When the insured keeps his books and accounts and inventories required by the policy and after a loss produces them to the adjuster of the company and thereafter the books and inventory are lost without the fault or negligence of the insured, the mere failure to produce them subsequently will not preclude a recovery on the policy.³¹⁴ The defense that the insured did not on demand submit his books and accounts for examination as required by the policy is unavailing where the insurer actually had the books of the insured and ample opportunity to examine both them and the insured and made actual use thereof in collecting a claim for re-insurance against another company.³¹⁵

³¹³ *Fleisch v. Insurance Co. of North America*, 58 Mo. App. 596, 23 Ins. Law J. 634.

³¹⁴ *Pelican Ins. Co. v. Wilkerson*, 53 Ark. 353, 13 S. W. 1103.

³¹⁵ *McKee v. Susquehanna Mut. Fire Ins. Co.*, 135 Pa. St. 544, 19 Atl. 1067.

CHAPTER XIV.

WAIVER OF NOTICE AND PROOFS OF LOSS.

§ 185. General Principles.

- 186. Waiver of Notice not Waiver of Proof.
- 187. Stipulations of Policy.
- 188-190. What Agents can Waive.
- 191-192. Waiver of Delay.
- 193-194. Waiver of Insufficiency.
 - 195. Amended or Additional Proofs.
 - 196. Proofs not Furnished by Proper Person.
- 197-198. Silence of Insurer.
- 199-200. Denial of Liability.
 - 201. — After Time to Furnish Proofs has Expired.
 - 202. — In Answer.
 - 203. Negotiations for Settlement.
 - 204. Proceedings to Ascertain or Adjust Loss.
 - 205. Furnishing or Refusal to Furnish Blanks.

GENERAL PRINCIPLES.

§ 185. Stipulations in insurance policies as to the time and manner of serving notice or proofs of loss may be waived by the insurer either expressly or by acts or conduct from which waiver may be reasonably inferred.

The stipulations in insurance policies regulating the time and manner of furnishing notice and proofs of loss, as well as their contents, are intended for the benefit of the insurer, by whom they may be waived. Provisions that only certain officers of the insurance company shall have power to waive specified conditions of the policy are valid; but a stipulation that the insurer itself cannot waive a provision at all, or only in a particular manner, as for instance, that "no officer, agent or representative of the insurer shall be held to have waived any

of the conditions of a policy unless such waiver shall be in writing and endorsed hereon," is ineffectual to limit the legal capacity of the company to afterwards bind itself contrary to the conditions of the policy by an agent acting within the scope of his authority, and the one who has power to waive a provision can always waive compliance with that part of the same provision which relates to the manner of waiver.¹

A waiver may be express, as where the insurer explicitly foregoes the furnishing of proofs; or implied, that is, by any acts or statements on the part of the insurer or its duly authorized agents which might fairly and reasonably induce the insured to conclude that the furnishing of notice or proofs is dispensed with or excused, and which influence him to rely thereon in good faith and to act accordingly.²

A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally, but also with knowledge of the circumstances. This is the rule where there is a direct and precise agreement to waive a stipulation. A *fortiori* is this the rule when there is no agreement either verbal or in writing to waive the stipulation, but where it is sought to deduce a waiver from the conduct of the party. Thus where a written agreement exists and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for the written agreement, he must show clearly not merely his own understanding, but that the other party had the same understanding, and each is conclusively presumed

¹ *Lamberton v. Connecticut Mut. Fire Ins. Co.*, 39 Minn. 129; *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234. See notes on "Agency," §§ 252 et seq.

² *Peninsular Land T. & M. Co. v. Franklin Ins. Co.*, 35 W. Va. 666; *Green v. Des Moines Fire Ins. Co.*, 84 Iowa, 135, 50 N. W. 558; *Hanscom v. Home Ins. Co.*, 90 Me. 333; *Inland Ins. & Deposit Co. v. Stauffer*, 33 Pa. St. 397.

to have intended and anticipated the ordinary and natural consequence of his own acts. If therefore after a loss has occurred, and after both insurer and insured knew of the loss, and before the time to furnish notice or proofs, or to amend those already furnished has expired, the conduct of the insurer has been such as to induce the insured, acting as a reasonably careful and prudent man, to believe that so much of the contract as provides for a forfeiture if the proofs or notice be not furnished in time, form, or manner, as required by the policy, would be dispensed with and not insisted upon or enforced, the insurer ought not in common justice to be allowed, and will not be allowed, to allege such forfeiture against one who has so believed as a result of such conduct, and who so believing and acting on such belief, has neglected to do what he otherwise would have done to comply with the provisions of the policy.³

But this rule only applies to acts of the insurer done while yet there is time for the insured to comply with the provisions of the policy. A waiver in this sense is in the nature of an estoppel. The company must by some agent having real or

³ *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330, 7 L. R. A. 82; *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 566; *Hartford Life Annuity Ins. Co. v. Unsell*, 144 U. S. 439; *Globe Mut. Life Ins. Co. v. Wolff*, 95 U. S. 326; *Bennecke v. Connecticut Mut. Life Ins. Co.*, 105 U. S. 355; *Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co.*, 11 Colo. App. 264, 53 Pac. 242.

A waiver is an intentional relinquishment of a known right. Thus, where an insurer's special agent sent to adjust a loss declared that the claim would not be paid because the plaintiff burned the property, but the referee found as a fact that the agent did not intend to waive the furnishing of proofs, and that the plaintiff did not understand that proofs were waived, and was not deceived or misled, the court held that there was no waiver. *Findeisen v. Metropole Fire Ins. Co.*, 57 Vt. 520; *Eastern R. Co. v. Relief Fire Ins. Co.*, 105 Mass. 579; *Brewer v. Chelsea Mut. Ins. Co.*, 14 Gray (Mass.), 209; *Blake v. Exchange Mut. Ins. Co.*, 12 Gray (Mass.), 265; *Underhill v. Agawam Mut. Fire Ins. Co.*, 6 Cush. (Mass.) 440.

apparent authority, have done or said something that induced the insured to do or forbear from doing something whereby he was prejudiced. When there is a failure to perform, which is due wholly to the fault of the insured, and if the policy declares that such failure shall forfeit all rights of the insured, the policy is *ipso jure* dead, and can only be revived by a new consideration or an express waiver made by the insurer subsequent to the forfeiture. If, under such a policy, notice or proofs are not served within the prescribed time and the insurer has done nothing to induce the omission, the insured will have lost all his rights; and if proofs are thereafter sent, the insurer is not bound to recognize them nor to call attention to any defects, nor is it then bound to specify its defenses, nor does it waive those not specified.⁴

There is, however, this exception to the rule last mentioned viz.:—if after knowledge of any default for which it might terminate the contract, or if after all right to recover on the contract has to the knowledge of the insurer become barred by the very terms of the contract itself because of the failure of the insured to perform some condition precedent to his right of recovery, the insurer does any acts or enters into any negotiations with the insured, which recognize the continuing

⁴ Weidert v. State Ins. Co., 19 Or. 261; Killips v. Putnam Fire Ins. Co., 28 Wis. 472; Carlson v. Supreme Council, A. L. H., 115 Cal. 466, 35 L. R. A. 643; Ermentrout v. Girard F. & M. Ins. Co., 63 Minn. 305; Engebretson v. Hekla Fire Ins. Co., 58 Wis. 301; Edwards v. Baltimore Fire Ins. Co., 3 Gill (Md.), 176, 2 Bennett, Fire Ins. Cas. 405; Smith v. Haverhill Mut. Fire Ins. Co., 1 Allen (Mass.), 297; Insurance Co. of North America v. Brim, 111 Ind. 281; Trask v. State F. & M. Ins. Co., 29 Pa. St. 198; Blossom v. Lycoming Fire Ins. Co., 64 N. Y. 166; Smith v. State Ins. Co., 64 Iowa, 716, 21 N. W. 145; Bolan v. Fire Ass'n of Philadelphia, 58 Mo. App. 225; Cohn v. Orient Ins. Co., 62 Mo. App. 271; Albers v. Phoenix Ins. Co., 68 Mo. App. 543; Harrison v. German American Fire Ins. Co., 67 Fed. 577; Armstrong v. Agricultural Ins. Co., 130 N. Y. 566; More v. New York Bowery Fire Ins. Co., 130 N. Y. 537, 29 N. E. 757.

validity of its obligation, or treats it as still in force and effect, the default or forfeiture is waived. Thus where the insurer with full knowledge of the existence of facts constituting a forfeiture of the rights of the insured, receives and retains without objection an insufficient notice or proof of loss which was not served within the prescribed time, and thereafter calls for further information and furnishes blank proofs for giving the same in connection with its demand, or requires and induces the insured to do some act or incur some trouble or expense inconsistent with the claim that the policy has become inoperative, it will be held to have waived, and will be estopped to assert, the defense that the notice or proofs were not in proper form and served in due time.⁵

These rules are applicable to statutory or standard policies as well as to the others.⁶

Forfeiture is not favored either in law or equity, and the provision for it in a contract will be strictly construed, and courts will find a waiver of it upon slight evidence when the justice and equity of the claim is, under the contract, in favor of the insured.⁷

⁵ *Trippe v. Provident Fund Soc.*, 140 N. Y. 23, 22 L. R. A. 432; *Argall v. Old North State Ins. Co.*, 84 N. C. 355; *Hanscom v. Home Ins. Co.*, 90 Me. 333; *Welsh v. London Assur. Corp.*, 151 Pa. St. 607; *Loeb v. American Cent. Ins. Co.*, 99 Mo. 50; *Covenant Mut. Life Ass'n v. Paughman*, 73 Ill. App. 544; *Crenshaw v. Pacific Mut. Life Ins. Co.*, 71 Mo. App. 42; *Standard L. & A. Ins. Co. v. Davis*, 59 Kan. 521, 53 Pac. 856, 27 Ins. Law J. 898; *Bennett v. Agricultural Ins. Co.*, 15 Abb. New Cas. (N. Y.) 234; *Thierolf v. Universal Fire Ins. Co.*, 110 Pa. St. 37; *Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co.*, 11 Colo. App. 264, 53 Pac. 242.

⁶ *Harris v. Phoenix Ins. Co.*, 85 Iowa, 238, 52 N. W. 128; *Hicks v. British America Assur. Co.*, 13 App. Div. (N. Y.) 444, 162 N. Y. 284, 48 L. R. A. 424.

⁷ *Bonenfant v. American Fire Ins. Co.*, 76 Mich. 653; *German Fire Ins. Co. v. Carrow*, 21 Ill. App. 631; *Thompson v. Phenix Ins. Co.*, 136 U. S. 287; *Turner v. Fidelity & Casualty Co.*, 112 Mich. 425, 38

The acts relied on to constitute a waiver of proofs of loss on the part of an insurer must be the acts of some one shown to have had authority to bind it; and such as to properly induce the insured to believe that proofs were not desired and if furnished would be unavailing. Whether or not the agent had power and authority to make the waiver, and whether there was in fact a waiver, are usually questions of fact;⁸ but if there be no conflict in the evidence and the inferences are certain it becomes a question of law.⁹

Illustrations.

Waiver.

Waiver of proofs of loss may be made by parol;¹⁰ and at any time, by consent of both parties. Proofs are unnecessary where the company has expressly waived them or has proceeded with the hearing of the claims as provided by the contract without them.¹² The statement of an adjuster authorized to adjust and settle a loss that the insured need not make out any proofs of loss is a waiver of proofs.¹³ So is a letter

L. R. A. 529; *Thierolf v. Universal Fire Ins. Co.*, 110 Pa. St. 37; *Martin v. Manufacturers' Acc. Ind. Co.*, 151 N. Y. 95-106.

⁸ *East Texas Fire Ins. Co. v. Coffee*, 61 Tex. 287; *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234; *Argall v. Old North State Ins. Co.*, 84 N. C. 355; *Barre v. Council Bluffs Ins. Co.*, 76 Iowa, 609; *German Ins. Co. v. Davis*, 40 Neb. 700, 59 N. W. 698; *Farmers' Mut. Fire Ins. Co. v. Moyer*, 97 Pa. St. 441; *Enterprise Ins. Co. v. Parisot*, 35 Ohio St. 35; *Lowry v. Lancashire Ins. Co.*, 32 Hun (N. Y.), 329; *Daniels v. Equitable Fire Ins. Co.*, 50 Conn. 551; *Blossom v. Lycoming Fire Ins. Co.*, 64 N. Y. 162; *Gristock v. Royal Ins. Co.*, 87 Mich. 428.

⁹ *Dwelling House Ins. Co. v. Dowdall*, 159 Ill. 179; *Gauche v. London & L. Ins. Co.*, 10 Fed. 347.

¹⁰ *Citizens' Ins. Co. v. Bland* (Ky.), 39 S. W. 825.

¹¹ *Baumgartel v. Providence Wash. Ins. Co.*, 61 Hun, 118, 15 N. Y. Supp. 573.

¹² *Fillmore v. Great Camp K. of M.*, 109 Mich. 13, 66 N. W. 675.

¹³ *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419.

from the insurer to the insured stating that an adjuster would call and settle a loss, followed by an investigation of the loss by such adjuster and his promise to settle.¹⁴ Notice and proof are waived where the general agent of the insurer, before the time for furnishing proofs has expired, informs the insured that the company's adjuster would attend to the loss, if the adjuster afterwards visits the premises and investigates the loss without demanding any notice or proof of loss;¹⁵ and by the insurer sending an agent to investigate and adjust the loss and retaining the adjustment without objection;¹⁶ and by the insurer taking possession of the damaged property, and books of account of the insured and investigating the extent of the loss;¹⁷ and by the insurer negotiating with the insured concerning an adjustment of the loss, and demanding a submission to arbitration free from any of the provisions or conditions prescribed by the policy;¹⁸ and where the insurer, after being notified of a loss, takes possession of, and retains the insured property for nineteen days, and offers to settle for the amount of an award, and denies liability on other grounds;¹⁹ and where the secretary of the insurer leads the

¹⁴ *Fulton v. Phenix Ins. Co.*, 51 Mo. App. 460; *Landrum v. American Cent. Ins. Co.*, 68 Mo. App. 339; *Roberts v. Northwestern Nat. Ins. Co.*, 90 Wis. 210, 62 N. W. 1048; *Lake v. Farmers' Ins. Co.*, 110 Iowa, 473, 81 N. W. 711.

¹⁵ *Harris v. Phenix Ins. Co.*, 85 Iowa, 238, 52 N. W. 128; *Gristock v. Royal Ins. Co.*, 87 Mich. 428, 49 N. W. 634, 84 Mich. 161, 47 N. W. 549.

¹⁶ *Fritz v. Lebanon Mut. Ins. Co.*, 154 Pa. St. 384, 26 Atl. 7.

¹⁷ *St. Paul F. & M. Ins. Co. v. Gotthelf*, 35 Neb. 351, 53 N. W. 137.

¹⁸ *Connecticut Fire Ins. Co. v. Hamilton (C. C. A.)*, 59 Fed. 258; *Hamilton v. Phenix Ins. Co. (C. C. A.)*, 61 Fed. 379.

¹⁹ *Caledonian Ins. Co. v. Traub*, 80 Md. 214; *Western Assur. Co. v. McCarty*, 18 Ind. App. 449, 48 N. E. 265, 27 Ins. Law J. 187; *Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co.*, 11 Colo. App. 264, 53 Pac. 242; *Weber v. Germania Fire Ins. Co.*, 16 App. Div. 596, 44 N. Y. Supp. 976; *Murphy v. North British & M. Ins. Co.*, 70 Mo. App. 78; *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29.

insured to believe that he need do nothing more, and promises an early payment of the loss.²⁰ Proofs of loss are waived by the adjuster of the insurer taking a written sworn statement of the insured and requiring him to furnish duplicate bills of goods, and telling him that nothing more is required, and offering a partial settlement;²¹ and by any act of the insurer or its agents which interferes with full compliance on the part of the insured.²²

The insolvency of a credit insurance company which makes an assignment nine days after the expiration of the year for which the policy was issued, is such a breach of the contract that the insured is relieved from the requirement of formal proofs of loss which he would otherwise have to make.²³ An insurer may waive the furnishing of proofs of loss in favor of a garnishing creditor of the insured, without the insured taking any part in the waiver or having any knowledge thereof.²⁴

No Waiver.

Proofs of loss are not waived by the insurer's adjuster visiting the premises and making a partial appraisal of the property destroyed, if the company thereafter insists upon the furnishing of proofs and an appraisement according to the

²⁰ *George Dee & Sons Co. v. Key City Fire Ins. Co.*, 104 Iowa, 167, 72 N. W. 594; *Brock v. Des Moines Ins. Co.*, 106 Iowa, 30, 75 N. W. 683; *Hitchcock v. State Ins. Co.*, 10 S. D. 271, 72 N. W. 898; *Perry v. Dwelling House Ins. Co.*, 67 N. H. 291, 33 Atl. 731.

²¹ *Wright v. London Fire Ins. Ass'n*, 12 Mont. 474, 19 L. R. A. 211; *Cushing v. Williamsburg City Fire Ins. Co.*, 4 Wash. 538.

²² *American Cent. Ins. Co. v. Heaverin (Ky.)*, 35 S. W. 922, 25 Ins. Law J. 711; *Young v. Grand Council, O. A.*, 63 Minn. 506, 65 N. W. 933; *George Dee & Sons Co. v. Key City Fire Ins. Co.*, 104 Iowa, 167, 72 N. W. 594; *Perry v. Dwelling-House Ins. Co.*, 67 N. H. 291, 33 Atl. 731.

²³ *Smith v. National Credit Ins. Co.*, 65 Minn. 283, 33 L. R. A. 511.

²⁴ *Ritter v. Boston Underwriters' Ins. Co.*, 28 Mo. App. 140.

terms of the policy, which requires the appraisement to be in writing and attached to the proofs;²⁵ nor by the refusal of an adjuster to settle a loss and his denial of liability because of a change in the use of the building contrary to the conditions of the policy, if the insurer thereafter, and within the time when proofs can be furnished, demands proofs of the insured and furnishes blanks therefor;²⁶ nor by the promise of an adjuster to settle the loss if the insured would get bills and invoices of the goods destroyed, where the company immediately thereafter, and while yet there is time to furnish them, insists upon further proofs;²⁷ nor by a general agent of an insurer stating, in reply to a notice claiming loss on the policy, that the notice had been received and the claim would have prompt attention;²⁸ nor by the promise of the insurer to call the attention of its adjuster to a loss;²⁹ nor by the collection by an insurer, after a loss, of a note given for part of the premium on a policy covering the loss;³⁰ nor by the furnishing to the insured at his request a copy of the policy after the time for making proofs has expired;³¹ nor by the failure of the insurer to demand proofs of loss or to voluntarily furnish blanks therefor.³²

An omission to give notice and make proofs of loss in compliance with the requirements of the policy of a mutual insurance company is not waived by a statement of the presi-

²⁵ *Scottish U. & N. Ins. Co. v. Clancy*, 83 Tex. 113, 18 S. W. 439.

²⁶ *Hahn v. Guardian Assur. Co.*, 23 Or. 576, 32 Pac. 683.

²⁷ *Allen v. Milwaukee Mechanics' Ins. Co.*, 106 Mich. 204, 64 N. W. 15.

²⁸ *German Ins. Co. v. Davis*, 40 Neb. 700, 59 N. W. 698; *Kirkman v. Farmers' Ins. Co.*, 90 Iowa, 457, 57 N. W. 952; *Welsh v. Des Moines Ins. Co.*, 71 Iowa, 337, 32 N. W. 369, 77 Iowa, 376, 42 N. W. 324.

²⁹ *Burlington Ins. Co. v. Kennerly*, 60 Ark. 532.

³⁰ *Shimp v. Cedar Rapids Ins. Co.*, 26 Ill. App. 254.

³¹ *Kirkman v. Farmers' Ins. Co.*, 90 Iowa, 457, 57 N. W. 952.

³² *Continental Ins. Co. v. Dorman*, 125 Ind. 189.

dent of the company made seventeen months after the loss that the company would be disposed to do what was right, that they knew at the time of the fire that it was their loss and were surprised that they were not notified; nor by a subsequent direction from the officers of the company to one of the assignees in insolvency of the insured, in reply to a verbal claim of loss made by him, to have a statement of the loss sent to them and they would take the subject into consideration; nor by a subsequent vote of the directors to require the insured to make a statement of the loss to them. Nor does the knowledge of the agent of the insurer that a loss has occurred relieve the insured from the duty of giving notice and making proofs of loss according to the stipulations of the policy.³³

The making of specific objections to proofs of loss which have been served, waives nothing more than the right to make objections on the grounds not specified.³⁴ The furnishing of proofs is not waived by a special agent of the insurer refusing to pay the loss, and stating that he neither admitted nor denied the company's liability, where it was subsequently agreed between insurer and insured that such agent should examine the facts concerning the loss without waiving any of the terms of the policy;³⁵ nor by a general local agent of the insurance company notifying the insured that an adjuster would visit him on a certain day, and asking the insured to have his appraiser ready to participate in an appraisal at that time.³⁶

The provisions of a policy requiring the proofs of loss to be furnished within a given time, are not waived by any acts or conduct of the company after the lapse of such time, unless

³³ *Smith v. Haverhill Mut. Fire Ins. Co.*, 1 Allen (Mass.), 297.

³⁴ *Sheehan v. Southern Ins. Co.*, 53 Mo. App. 351.

³⁵ *Insurance Co. of North America v. Caruthers* (Miss.), 16 So. 911.

³⁶ *Harrison v. Hartford Fire Ins. Co.*, 59 Fed. 732.

the doctrine of estoppel can be invoked in favor of the insured.³⁷ An implied waiver of either notice or proofs of loss must be based upon the acts and conduct of the insurer after it had knowledge of the loss.³⁸

WAIVER OF NOTICE NOT WAIVER OF PROOF.

§ 186. The mere waiver of notice of loss is not of itself a waiver of proofs of loss.

Though the principles of the law of waiver regulating the giving of proofs of loss are applicable to the waiver of notice of loss, it must be borne in mind that both notice and proofs are frequently required to be given. While the furnishing of proofs within the time for furnishing notice may sometimes dispense with the notice, the converse is not true. Thus where a policy requires the insured to give both notice and proofs of loss, the mere giving of a preliminary notice in due time is not sufficient, even though the insurer does not thereafter demand proofs; and the waiver of the giving of notice is not a waiver of the provision requiring a giving of proofs.³⁹

The giving of preliminary notice of loss is waived by the insurer if it receives and retains proofs of loss without objection and thereafter requests the insured to furnish further and amended proofs of loss, or does any other act recognizing

³⁷ Bolan v. Fire Ass'n of Philadelphia, 58 Mo. App. 225; Cohn v. Orient Ins. Co., 62 Mo. App. 271; Edwards v. Baltimore Fire Ins. Co., 3 Gill (Md.), 176, 2 Bennett, Fire Ins. Cas. 405; Ermentrout v. Girard F. & M. Ins. Co., 63 Minn. 305, 30 L. R. A. 346; Albers v. Phenix Ins. Co., 68 Mo. App. 543. See, also, ante, first sections this chapter.

³⁸ Alston v. Northwestern Live Stock Ins. Co., 7 Kan. App. 179, 53 Pac. 784; Globe Mut. Life Ins. Co. v. Wolff, 95 U. S. 326; Bennecke v. Connecticut Mut. Life Ins. Co., 105 U. S. 355.

³⁹ O'Reilly v. Guardian Mut. Life Ins. Co., 60 N. Y. 169; Lane v. St. Paul F. & M. Ins. Co., 50 Minn. 227; De Silver v. State Mut. Ins. Co., 38 Pa. St. 130; Armstrong v. Agricultural Ins. Co., 130 N. Y. 566, 29 N. E. 994.

its liability on the policy and from which a waiver of notice can be inferred.⁴⁰ Thus an accident insurance company waives the provision in a policy requiring immediate notice of accident by furnishing the assured blanks upon which to make proofs of disability without objecting to the failure to give notice.⁴¹

STIPULATIONS OF POLICY.

§ 187. Stipulations in insurance policies restricting the form and manner of waiver of proofs or notice of loss are binding upon local agents and agents of limited powers, but not upon general agents.

Many cases hold that the stipulations in a policy to the effect that no officer, agent or representative of the insurer shall have power to waive any of the provisions or conditions of the policy unless in writing and endorsed upon the policy itself, are applicable only to the conduct and powers of agents as related to matters connected with the issuing of the policy and happening prior to the occurrence of a loss, and do not apply to matters and conditions arising after the happening of a loss and therefore not to a waiver of notice or proofs of loss;⁴² nor to such a waiver of proofs as arises by operation

⁴⁰ *Weed v. Hamburg-Bremen Fire Ins. Co.*, 133 N. Y. 394; *Partridge v. Milwaukee Mechanics' Ins. Co.*, 13 App. Div. 519, 43 N. Y. Supp. 632; *Travellers' Ins. Co. v. Edwards*, 122 U. S. 457; *Crenshaw v. Pacific Mut. Life Ins. Co.*, 71 Mo. App. 42; *Standard Life & Acc. Ins. Co. v. Davis*, 59 Kan. 521, 53 Pac. 856, 27 Ins. Law J. 898; *Covenant Mut. Life Ass'n v. Baughman*, 73 Ill. App. 544.

⁴¹ *Crenshaw v. Pacific Mut. Life Ins. Co.*, 71 Mo. App. 42.

⁴² *American Fire Ins. Co. v. Sisk*, 9 Ind. App. 305, 36 N. E. 659; *Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. Fire Ins. Co.*, 110 Iowa, 423, 81 N. W. 709; *Concordia Fire Ins. Co. v. Johnson*, 4 Kan. App. 7, 45 Pac. 722; *Loeb v. American Cent. Ins. Co.*, 99 Mo. 50; *Lake v. Farmers' Ins. Co.*, 110 Iowa, 473, 81 N. W. 711; *Harrison v. German-American Fire Ins. Co.*, 67 Fed. 577; *Rokes v. Amazon Ins. Co.*, 51 Md. 512; *Flaherty v. Continental Ins. Co.*, 20 App. Div. (N. Y.) 275.

of law from a denial of liability, but only to acts done before the policy becomes a demand against the insurer.⁴³ Others hold that they are binding and valid and govern the rights of the parties to the contract in so far as the acts of agents of limited and restricted powers are concerned, and when a waiver is sought to be predicated upon their acts or conduct but not according to the provisions of the policy;⁴⁴ but are not binding upon the officers or adjusters or general agents of the insurer in their dealings with the assured after a loss has occurred.⁴⁵

The true rule would seem to be that any insurer has the right to limit the powers of its agent by suitable conditions in the policy, and of these limitations the insured is bound to take notice after the policy has been delivered to him; that an insurer cannot by general stipulations against waiver, or by stipulations that waiver must be in writing and indorsed upon the policy, so limit its capacity to contract that it cannot by and through proper agents make an oral waiver not forbidden by statute. Insurers are usually corporations and as such can only act through their agents. Provisions in the policies are inserted by them and can be changed at any time by any

⁴³ *Fire Ass'n of Philadelphia v. Jones* (Tex. Civ. App.), 40 S. W. 44; *Bishop v. Agricultural Ins. Co.*, 9 N. Y. Supp. 350; *Goodwin v. Massachusetts Mut. Life Ins. Co.*, 73 N. Y. 480; *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 102.

⁴⁴ *Kirkman v. Farmers' Ins. Co.*, 90 Iowa, 457, 57 N. W. 952; *Knudson v. Hekla Fire Ins. Co.*, 75 Wis. 198; *Gould v. Dwelling-House Ins. Co.*, 90 Mich. 302, 51 N. W. 455; *Quinlan v. Providence Wash. Ins. Co.*, 133 N. Y. 364; *Oshkosh Match Works v. Manchester Fire Assur. Co.*, 92 Wis. 510, 66 N. W. 525.

⁴⁵ *Powers v. New England Fire Ins. Co.*, 68 Vt. 390; *Brock v. Des Moines Ins. Co.*, 106 Iowa, 30, 75 N. W. 683; *American Cent. Ins. Co. v. Heavenin* (Ky.), 35 S. W. 922; *Heusinkveld v. St. Paul F. & M. Ins. Co.*, 106 Iowa, 229, 76 N. W. 696; *Concordia Fire Ins. Co. v. Johnson*, 4 Kan. App. 7, 45 Pac. 722; *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 297; *Phenix Ins. Co. v. Bowdre*, 67 Miss. 620.

duly authorized agent with the consent of the insured. Any agent, general or otherwise, who is authorized to represent the insurer in adjusting or settling a loss, has, as a necessary incident to the proper discharge of his duties, the power to dispense with those stipulations inserted for the benefit of the company and which have reference to the mode of ascertaining the liability or limiting the right of action. Whether or not any particular agent has the power to make an oral waiver of a condition, notwithstanding the provisions of the policy requiring such waiver to be in writing indorsed on the policy, must be determined as a question of fact according to the general rules of the law of agency; and whether or not a waiver actually took place is ordinarily a simple question of fact.⁴⁶

WHAT AGENTS CAN WAIVE.

§ 188. Whether or not a given insurance agent can waive notice or proofs of loss, death, or accident, depends not so much upon the classification of the agent, as upon the authority which his principal has given him or has allowed him to exercise, or has held him out as possessing.

Power in an agent must be proved by the one asserting it.

§ 189. General agents and adjusters can waive notice and proofs of loss.

§ 190. The better rule is that merely local agents, i. e. agents authorized only to fix rates, countersign and deliver policies,

⁴⁶ *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; *Ruthven v. American Fire Ins. Co.*, 102 Iowa, 550, 71 N. W. 577; *Kirkman v. Farmers' Ins. Co.*, 90 Iowa, 457, 57 N. W. 952; *Brock v. Des Moines Ins. Co.*, 106 Iowa, 30, 75 N. W. 683; *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143; *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234; *Berry v. American Cent. Ins. Co.*, 132 N. Y. 49; *Phoenix Ins. Co. v. Bowdre*, 67 Miss. 620; *Oshkosh Match Works v. Manchester Fire Assur. Co.*, 92 Wis. 516; *Searle v. Dwelling-House Ins. Co.*, 152 Mass. 263; *Dwelling-House Ins. Co. v. Dowdall*, 159 Ill. 179; *Hartford Life & Annuity Ins. Co. v. Hayden's Adm'r*, 90 Ky. 46; *Lowry v. Lancashire Ins. Co.*, 32 Hun (N. Y.), 331; *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 326; *Blake v. Exchange Mut. Ins. Co.*, 12 Gray (Mass.), 265; *Lake v. Farmers' Ins. Co.*, 110 Iowa, 473, 81 N. W. 711.

and collect premiums, have no power to waive either notice or proofs.

A contrary rule prevails in some jurisdictions.

The General Rule.

The power of any agent to waive proofs or notice of loss depends upon the real or apparent authority with which his principal has clothed him. Broadly speaking, general and adjusting agents have the power to waive notice or proofs; special or local agents have not that power. It is impossible to lay down an absolute rule, which will specify definitely what agents and classes of agents have or have not the power to waive notice or proofs of loss, or to bind the insurer by other acts from which waiver might be presumed if the power to waive existed in the agent. The designation of an agent as a general agent or a local agent gives no clear or precise idea of his powers. There are local general agents and general local agents, and these terms are often used as merely descriptive of the territory within which an agent of any class operates. An agent of an insurance company possesses only such powers in any particular as have been conferred verbally or by instrument of authorization, or such as his principal has clothed him with or has held him out as possessing. Where the act or representation of an agent is alleged to be that of an insurer and therefore binding upon the latter, the test of liability is the same as in other cases of agency. No maxim is better settled in the law than that a principal is not bound by the acts of an agent done outside of the known limitation of his authority; and it is immaterial whether the agent be general or special, because the principal may limit the powers of one as well as of the other. But an agent can always bind his principal by acts performed within the scope of his real or apparent authority, and secret limitations upon his authority affect only those to whom they are published or

known. Whether, therefore, an agent in a given case has the power to waive notice or proofs of loss absolutely, or only in a particular manner, or at all, and whether waiver actually did take place, must be determined not so much from the classification of the agent as from the facts and circumstances of the case interpreted in the light of all the acts, conduct, and relations of the agent and principal between themselves and toward the public or the individual asserting the waiver.⁴⁷

Waiver of notice or proofs of loss cannot be shown by the acts of an agent or adjuster without proof of his authority to act for the insurer in that connection; and the one asserting waiver of proofs or notice by an agent, must prove that the agent represented the insurer and possessed the power which is asserted to be in him.⁴⁸ And the mere assumption of authority by an agent and reliance thereon by the insured will not bind the insurer in the absence of evidence of authority conferred or recognition by it.⁴⁹

⁴⁷ *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; *Quinlan v. Providence Wash. Ins. Co.*, 123 N. Y. 365; *Weidert v. State Ins. Co.*, 19 Or. 261; *Dwelling House Ins. Co. v. Dowdall*, 159 Ill. 179; *Lowry v. Lancashire Ins. Co.*, 32 Hun (N. Y.), 331. See, ante, c. 8, "Agents," and ante, "Stipulations of Policy."

Where the contract in suit was issued by a foreign company empowered to do business in Maryland on condition that its agent was required to have authority "from the parent office or offices to settle losses without the interference of the officer or officers of the said parent office or offices," it was held that such an agent could bind his principal by waiving proofs. *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 546.

⁴⁸ *Barre v. Council Bluffs Ins. Co.*, 76 Iowa, 609; *German Ins. Co. v. Davis*, 40 Neb. 700, 59 N. W. 698; *Weidert v. State Ins. Co.*, 19 Or. 261; *Albers v. Phoenix Ins. Co.*, 68 Mo. App. 543; *East Texas Fire Ins. Co. v. Coffee*, 61 Tex. 287.

⁴⁹ *Bowlin v. Hekla Fire Ins. Co.*, 36 Minn. 435; *Bush v. Westchester Fire Ins. Co.*, 63 N. Y. 531.

General Agents.

A general agent of an insurer, i. e., an agent who has exclusive charge and control of his principal's interests within a given territory, is within that territory a vice-principal and as such has the power to waive notice or proofs.⁵⁰

⁵⁰ *Bishop v. Agricultural Ins. Co.*, 9 N. Y. Supp. 350; *Brock v. Des Moines Ins. Co.*, 106 Iowa, 30, 75 N. W. 684; *Smith v. Niagara Fire Ins. Co.*, 60 Vt. 682; *American Cent. Ins. Co. v. Heaverin* (Ky.), 35 S. W. 922; *Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co.*, 64 Minn. 63; *Lamberton v. Connecticut Fire Ins. Co.*, 39 Minn. 129, 1 L. R. A. 222; *German Ins. Co. v. Gray*, 43 Kan. 497, 8 L. R. A. 70. See cases supra.

Agents who have authority to settle losses may dispense with stipulations for the benefit of their principal which refer to the mode of ascertaining its liability and limiting the right of action against it. *Little v. Phoenix Ins. Co.*, 123 Mass. 380, citing *Eastern R. Co. v. Relief Fire Ins. Co.*, 105 Mass. 570; *Kennebec Co. v. Augusta Insurance & Banking Co.*, 6 Gray (Mass.), 204; *Gloucester Mfg. Co. v. Howard Fire Ins. Co.*, 5 Gray (Mass.), 497.

An agent intrusted with policies, and given power to insure, may waive the notice and proof of loss required by the policy, notwithstanding a provision that no agent shall have power to waive any of the conditions of the policy. *Fire Ass'n of Philadelphia v. Jones* (Tex. Civ. App.), 40 S. W. 44; *Smaldone v. Insurance Co. of North America*, 15 App. Div. 232, 44 N. Y. Supp. 201; *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131; *Springfield F. & M. Ins. Co. v. Davis* (Ky.), 37 S. W. 582; *Fisher v. Crescent Ins. Co.*, 33 Fed. 544; *Snyder v. Dwelling-House Ins. Co.*, 59 N. J. Law, 544, 37 Atl. 1022, 26 Ins. Law J. 905.

The general manager of a department of an insurance company has power, in connection with policies issued within his department, to orally waive the conditions of the policy requiring proofs of loss, although the policy itself requires all waivers to be in writing and attached thereto. *Ruthven v. American Fire Ins. Co.*, 102 Iowa, 550, 71 N. W. 574, citing *Dwelling House Ins. Co. v. Dowdall*, 159 Ill. 179; *Berry v. American Cent. Ins. Co.*, 132 N. Y. 49; *Hartford Life & Annuity Ins. Co. v. Hayden's Adm'r*, 90 Ky. 46; *Rokes v. Amazon Ins. Co.*, 51 Md. 512, 34 Am. Rep. 323; *Lamberton v. Connecticut Fire Ins. Co.*, 39 Minn. 129, 1 L. R. A. 222; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; *Phoenix Ins. Co. v. Bowdre*, 67 Miss. 620; *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143; *Dick v. Equitable F. & M. Ins. Co.*,

Local Agent.

A local agent, that is, one who is authorized merely to fix rates of insurance and countersign and deliver policies and collect premiums, cannot after a loss waive the provisions of a policy requiring notice and proofs of loss. In the matter of the original contract, and while the property which is the subject of it continues as it was when insured, the local agent

92 Wis. 46; *Renier v. Dwelling House Ins. Co.*, 74 Wis. 89; *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234, 24 L. ed. 689; *Searle v. Dwelling House Ins. Co.*, 152 Mass. 263. Distinguishing *Kirkman v. Farmers' Ins. Co.*, 90 Iowa, 457; *Zimmerman v. Home Ins. Co.*, 77 Iowa, 686.

Service upon the agent who issues the policy is sufficient, *Greenlee v. Hanover Ins. Co.*, 104 Iowa, 481, 73 N. W. 1050. The statement of the agent who issued the policy and collected the premium, made within the time for furnishing proofs, that the company refused to pay the loss, waives the furnishing of proofs. But proofs are not waived by such a statement made after the expiration of the time for furnishing them. *Phenix Ins. Co. v. Searles*, 100 Ga. 97, 27 S. E. 779.

Waiving the condition as to formal proofs of loss is at least within the scope of the apparent authority of a special agent of an insurer, sent by it to view the ruins, investigate the loss, and find out as much about it as he could, who, being consulted with by the local agent as to when the policy would be paid, replied authoritatively, and to whom the proofs of loss when made, were finally turned over, together with the whole matter, for such steps as he should deem proper. *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29; *Travellers' Ins. Co. v. Edwards*, 122 U. S. 457, 7 Sup. Ct. 1249.

An agent with authority to waive proofs of loss may also waive a provision of the policy requiring such waiver to be indorsed on the policy. *O'Leary v. German American Ins. Co.*, 100 Iowa, 390, 69 N. W. 686.

Standard policy: A provision in a standard policy that no agent shall have power to waive any of its conditions, except by a writing indorsed on or attached to the policy, is valid, and a verbal waiver of proofs of loss by him is not binding on the company. *Wadhams v. Western Assur. Co.*, 117 Mich. 514, 76 N. W. 6; *Straker v. Phenix Ins. Co.*, 101 Wis. 413, 77 N. W. 753; *Anderson v. Manchester Fire Assur. Co.*, 59 Minn. 189.

who issued the policy must be deemed to be possessed of certain incidental powers by virtue of which he may waive certain conditions in the policy; but when a loss occurs, which gives rise to the assertion of a claim against the insurer, the proceedings to establish and enforce such a claim are not impliedly embraced within the scope of such an agency. It is not to be presumed in the absence of express authority, or conduct on the part of the company from which it may be implied, that such an agent, commonly termed a local agent, is empowered to suggest or agree to a different mode of settlement or to bind the company by any different line of procedure than that designated in the policy.⁵¹

In What States Local Agents can Waive.

The authorities on both sides of this question are very thoroughly discussed and fully cited in a recent Missouri case.⁵² The court said:

“The legal proposition to be decided is whether an agent of an insurance company, who has power to effect insurance, countersign policies, and collect premiums, has *prima facie* power to waive proof of loss. * * * Wood on Insurance (2d Ed., p. 915, § 429) lays down the doctrine that an

⁵¹ Lohnes v. Insurance Co. of North America, 121 Mass. 439; Bowlin v. Hekla Fire Ins. Co., 36 Minn. 435; Bush v. Westchester Fire Ins. Co., 63 N. Y. 531; Shapiro v. Western Home Ins. Co., 51 Minn. 239; Shapiro v. St. Paul F. & M. Ins. Co., 61 Minn. 136; Knudson v. Hekla Fire Ins. Co., 75 Wis. 198, 43 N. W. 954; Gould v. Dwelling House Ins. Co., 90 Mich. 302; Harrison v. Hartford Fire Ins. Co., 59 Fed. 732; Burlington Ins. Co. v. Kennerly, 60 Ark. 532; Smith v. Niagara Fire Ins. Co., 60 Vt. 682, 1 L. R. A. 217; McCollum v. North British & Mercantile Ins. Co., 65 Mo. App. 304; Van Allen v. Farmers' Joint Stock Ins. Co., 64 N. Y. 469; Ermentrout v. Girard F. & M. Ins. Co., 63 Minn. 305, 30 L. R. A. 347; Engebretson v. Hekla Fire Ins. Co., 58 Wis. 301.

⁵² Nickell v. Phoenix Ins. Co., 144 Mo. 420, 46 S. W. 435, 27 Ins. Law J. 880.

agent who has authority to issue and countersign policies has no authority to adjust and settle losses, or to waive the performance of conditions in the policy; that ratification by the company of the acts of such agent must be shown. Ostrander on Insurance (2d Ed., p. 197, § 27) says the local agent's power to waive proof of loss depends upon his authority to settle claims, and that as the duties of a local agent and of an adjuster are different, the local agent cannot waive proof of loss, unless it is shown that he had authority to settle claims, or had apparent authority, as shown by previous dealings of the company. This view of the law is also laid down in the following cases.⁵³ * * * These cases proceed upon the assumption that an agent who has power to effect a contract of insurance, to countersign policies in order to give them vitality and binding force, and to collect premiums, is a special, limited agent, and not a general agent, and that the duties and powers of such a special and limited agent do not authorize him to waive proof of loss. On the other hand, a contrary view of the law is adopted by the following text writers, and in the following cases: May on Insurance (3d Ed., §§ 461, 463) says that the notice and proof of loss is intended for the benefit of the insurer, and notwithstanding the policy requires it to be in writing, nevertheless, if the company receives it, although it comes from a local agent of the company, upon information communicated to him by the assured, it is sufficient; and that even in cases where the policy provides that it must be given to the manager, 'or to some known agent of the company,' and the policy had been negotiated through a local agent, and the business of the insurer, before the loss, was, without notice to the assured, transferred to another company, notice to the local agent is sufficient. Joyce on Insurance (section 537) says that where a foreign insurance company has

⁵³ Citing some of cases in note 51, ante.

no general agent in the state, but employs a local agent to represent it, such agent has power to bind the company by waiving a forfeiture, or by construing doubtful language in the policy when called on by the insured for information, and cites *Hotchkiss v. Phoenix Ins. Co.*^{53a} as authority. The same author, in section 583, lays down the rule that 'an agent intrusted with policies signed in blank, and authorized to fill out and deliver them, may waive proof of loss,' and cites in support of the text:⁵⁴ * * * *Biddle on Insurance* (sec. 1136) says proof of loss may be waived, as where the insurer or his authorized representative tells the insured not to present such proof. It has been held that an agent who effects insurance, has policies signed in blank, which provide they shall not be valid until countersigned by him, and who issues and countersigns such policies, is a general agent, and has power to waive proof of loss.⁵⁵ * * * In some of the cases that deny the authority of the local agent to waive proof of loss, it is held that, where the policy prescribes that

^{53a} 76 Wis. 269, 44 N. W. 1106.

⁵⁴ *Franklin Fire Ins. Co. v. Coates*, 14 Md. 285; *Imperial Fire Ins. Co. v. Murray*, 73 Pa. St. 13; *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241; *Ide v. Phoenix Ins. Co.*, 2 Biss. 333, Fed. Cas. No. 7,001; *Norwich & N. Y. Transp. Co. v. Western Massachusetts Ins. Co.*, 34 Conn. 561; *McBride v. Republic Fire Ins. Co.*, 30 Wis. 562. See, also, *O'Leary v. German Amer. Ins. Co.*, 100 Iowa, 390, 69 N. W. 686; *Von Genetchtin v. Citizens' Ins. Co.*, 75 Iowa, 544, 39 N. W. 881; *Ruthven v. American Fire Ins. Co.*, 92 Iowa, 316, 60 N. W. 663; *Edwards v. Lycoming County Mut. Ins. Co.*, 75 Pa. St. 378.

⁵⁵ *Eastern R. Co. v. Relief Fire Ins. Co.*, 105 Mass. 570; *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289; *Marsden v. City & County Assur. Co.*, L. R. 1 C. P. 232; *Kendall v. Holland Purchase Ins. Co.*, 2 Thomp. & C. (N. Y.) 375; *Bernero v. South British & Nat. Ins. Co.*, 65 Cal. 386; *Phoenix Ins. Co. v. Perry*, 131 Ind. 572; *Pennell v. Lamar Ins. Co.*, 73 Ill. 303; *Lycoming Fire Ins. Co. v. Dunmore*, 75 Ill. 14; *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 538; *Phoenix Ins. Co. v. Munger*, 49 Kan. 178; *Hartford Fire Ins. Co. v. Kahn*, 4 Wyo. 364.

proof of loss can only be waived in writing by indorsement on the policy, a parol waiver is insufficient;⁵⁶ while the contrary doctrine is announced in *Hartford Fire Ins. Co. v. Kahn*,⁵⁷ and by all the text writers, and by nearly all of the other cases cited on both sides of the proposition, and is supported by the almost universally recognized doctrine that a written contract may be varied or rescinded by a subsequent parol agreement. In *Barre v. Council Bluffs Ins. Co.*,⁵⁸ and in *Hollis v. State Ins. Co.*,⁵⁹ the rule is announced that neither the local agent nor the adjuster has power, without affirmative authority or ratification shown, to waive proof of loss, such power being said to be not necessary to the proper discharge of the duties ordinarily incident to their respective functions. Some of the cases draw a distinction between the power of a local agent of a foreign insurance company and that of such an agent of a home insurance company. But this distinction is not persuasive, much less convincing. The conflict among these precedents cannot be harmonized. The courts having simply announced conclusions, drawn, without any attempt, in most instances, at analysis or logical deduction, from the same premises, they must be accepted as the opinions of the several courts, and not as establishing a scientific legal principle. The undoubted weight of authority sustains the power of the local agent to waive the proof of loss. The cases which deny it generally concede that power to the adjuster, while the Iowa cases referred to deny the power to both the local agent and the adjuster."

⁵⁶ *Burlington Ins. Co. v. Kennerly*, 60 Ark. 532; *Smith v. Niagara Fire Ins. Co.*, 60 Vt. 682, 1 L. R. A. 217.

⁵⁷ 4 Wyo. 364.

⁵⁸ 76 Iowa, 609.

⁵⁹ 65 Iowa, 454.

Adjuster.

An adjuster is an agent of an insurer, whose duties generally consist in investigating losses, and negotiating for and making settlements thereof. Waiver of proofs of loss by an agent sent by an insurer to investigate and adjust a loss, is binding upon the company in the absence of notice to the insured of any limitation upon the authority of the agent. It is presumed that an adjuster has the power to waive either or both notice and proofs.⁶⁰ The agreement by an adjuster of an insurer to settle a loss waives the necessity of proofs;⁶¹ and a denial by an adjuster of any liability of his company under the policy is a waiver of proofs.⁶² But notice and proof is not waived by any act or declaration of an adjuster, who does not claim to and has no authority to represent the insurer even though the company afterwards adopts some of his acts.⁶³

While an adjuster can waive the furnishing of proofs of loss within the stipulated time, he cannot delegate his authority in that particular to another agent in the absence of a showing that such a practice was previously authorized or afterwards ratified by the principal; and the conduct of an adjusting agent after the expiration of the time limited for the furnishing of proofs of loss, cannot be relied on as a

⁶⁰ *Enos v. St. Paul F. & M. Ins. Co.*, 4 S. D. 639, 57 N. W. 919; *East Texas Fire Ins. Co. v. Brown*, 82 Tex. 631; *Wright v. London Fire Ins. Co.*, 12 Mont. 474, 19 L. R. A. 211; *Lake v. Farmers' Ins. Co.*, 110 Iowa, 473, 81 N. W. 711; *Slater v. Capital Ins. Co.*, 89 Iowa, 628, 23 L. R. A. 181; *Dibbrell v. Georgia Home Ins. Co.*, 110 N. C. 193; *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29; *Faust v. American Fire Ins. Co.*, 91 Wis. 158, 30 L. R. A. 783; *German Ins. Co. v. Gray*, 43 Kan. 497, 8 L. R. A. 70.

⁶¹ *Smith v. Home Ins. Co.*, 47 Hun (N. Y.), 30.

⁶² *Trundle v. Providence Wash. Ins. Co.*, 54 Mo. App. 188; *Flaherty v. Continental Ins. Co.*, 20 App. Div. (N. Y.) 275, 46 N. Y. Supp. 934.

⁶³ *Mitchell v. Minnesota Fire Ass'n*, 48 Minn. 284, 51 N. W. 608.

waiver of failure to furnish proofs within the prescribed time, unless the whole matter of the adjustment and settlement of a loss has been entrusted to the adjuster. The authority to investigate and report on a loss is different from the authority to make absolute disposition of a loss.⁶⁴ The adjuster of one insurance company who goes at the request of an adjuster of another company to examine a loss, has no authority to waive proofs of loss for the latter company unless it be shown that its adjuster had the power to delegate such authority.⁶⁵

WAIVER OF DELAY.

§ 191. Any delay in the furnishing of notice of loss is waived by the insurer if, after the expiration of the time within which according to the terms of the policy notice may be served,

- (a) It receives and retains proofs without objection, or
- (b) Demands and receives an original or supplemental notice.

§ 192. Any delay in the furnishing of proofs is waived by the insurer —

- (a) Receiving and retaining overdue proofs without objection,
- (b) Or treating the service of overdue proofs as being a sufficient compliance with requirements of the policy,
- (c) Or by conduct which operates to create an estoppel.

An insurer cannot take advantage of any delay which it has itself caused.

Waiver of Delay in Serving Notice.

If an insurer after having received notice of loss from its agent puts itself in communication with the insured, who in due time furnishes proofs of loss which are retained without objection, it cannot thereafter object to the failure of the insured to give immediate notice of loss as required by the pol-

⁶⁴ *Albers v. Phoenix Ins. Co.*, 68 Mo. App. 543.

⁶⁵ *Ruthven v. American Fire Ins. Co.*, 92 Iowa, 316, 60 N. W. 663; *Atlantic Ins. Co. v. Carlin*, 58 Md. 336.

icy.⁶⁶ A forfeiture caused by the delay in giving notice within the prescribed time is waived by the insurer sending the insured blanks for proofs of loss and thereafter making a bodily examination of the insured, even though the blanks are accompanied with the statement that their furnishing shall not be held a waiver of the notice.⁶⁷

Waiver of Delay in Serving Proofs.

An insurer waives absence of notice and the service of proofs in proper form within the prescribed time by demanding further proofs, and when these are furnished by retaining them without objection and thereafter making an offer of settlement and denying all liability under the policy without objecting to the failure to serve notice or proofs properly.⁶⁸ Any delay in furnishing proofs of loss is waived by the insurer thereafter sending its adjuster to examine into the circumstances in connection with the fire and to estimate the cost of rebuilding;⁶⁹ and by calling for and receiving additional information and proof respecting the injury and death of the insured.⁷⁰ A demand for an amended notarial certificate is a waiver of the objection that the proofs to which the defective certificate was attached were not furnished in time;⁷¹ and the retention without objection of a second no-

⁶⁶ *Partridge v. Milwaukee Mechanics' Ins. Co.*, 13 App. Div. 519, 43 N. Y. Supp. 632; *Trippe v. Provident Fund Soc.*, 140 N. Y. 23, 22 L. R. A. 432; *Rheims v. Standard Fire Ins. Co.*, 39 W. Va. 672.

⁶⁷ *Peabody v. Fraternal Acc. Ass'n*, 89 Me. 96, 35 Atl. 1020.

⁶⁸ *McElroy v. John Hancock Mut. Life Ins. Co.*, 88 Md. 137, 41 Atl. 112; *Hohn v. Inter-State Casualty Co.*, 115 Mich. 79, 72 N. W. 1105.

⁶⁹ *Capital City Ins. Co. v. Caldwell*, 95 Ala. 77, 10 So. 355; *Loeb v. American Cent. Ins. Co.*, 99 Mo. 50.

⁷⁰ *Standard L. & A. Ins. Co. v. Davis*, 59 Kan. 521, 53 Pac. 856, 27 Ins. Law J. 898; *McElroy v. John Hancock Mut. Life Ins. Co.*, 88 Md. 137, 41 Atl. 112.

⁷¹ *Merchants' Ins. Co. v. Gibbs*, 56 N. J. Law, 679; *Badger v. Glens Falls Ins. Co.*, 49 Wis. 389, 5 N. W. 845.

tarial certificate furnished after objection made to a former one waives any delay in the service.⁷²

Estoppel.

The insurer waives its rights to object to any delay in the furnishing of proofs of death, which were promptly served by the assignee of the policy after he learned of the death of the insured, by retaining premiums paid on the policy by the assignee after the death of the insured but before the fact of the death was known to either insurer or assignee. A new consideration is not always necessary to support a binding waiver of the stipulations of a life insurance policy respecting the time of serving proofs of death. A waiver may be established by proof of acts or conduct of the insurer subsequent to the breach indicating an intention to waive such stipulations, though there be no new consideration therefor and no technical estoppel.

In the case of *Prentice v. Knickerbocker Life Ins. Co.*, the defendant in August, 1867, issued a policy of life insurance upon the life of one M. The conditions of the policy required that the defendant should be notified forthwith of the death of the insured and that full proofs of the death "be served within twelve months after the time of death or all claims under this policy will be forfeited." In December, 1867, M. with the knowledge and assent of the defendant assigned the policy to the plaintiff, who thereafter paid the premiums. In July, 1872, the plaintiff, being about to go to Europe, paid to the defendant's general agent in advance the premiums for that year which would not be due until August. The question being raised as to the position of the parties in case the insured should die before such premium became due, the general agent stated that defendant had agents, who

⁷² *Smith v. Home Ins. Co.*, 47 Hun (N. Y.), 30.

would know of the death before plaintiff could, and if he advanced the money, it would be returned if not earned by the insurer. The insured died in July, 1873, but his death did not become known to the parties until July, 1875. Plaintiff paid the premiums for 1873 and 1874 upon receiving from defendant the usual notice that they were due, and defendant executed and delivered its usual renewal receipts for such premiums. Immediately upon being advised of the death of the insured, the plaintiff notified the company of that fact and upon application was furnished by the defendant with blank proofs of loss, which proofs stating the time of death he prepared and delivered to the defendant in July, 1875. Defendant received and retained such proofs until October, 1875, without objection; and then it took the ground that the claim was forfeited because the proofs were not furnished within the proper time, but making no offer until after the commencement of this action to return the premiums paid it by plaintiff after the death of the insured. The court held that the circumstances justified the finding of waiver of the forfeiture by which defendant was precluded from insisting upon plaintiff's failure to furnish proofs within the twelve months.⁷³

Delay Induced by the Insurer.

A delay caused by the insurer itself cannot prejudice the insured.⁷⁴ An insurer will never be permitted to complain of any delay to which it has contributed, or which has been caused by its negotiations or dealings with the insured looking towards an adjustment or settlement of the loss, and from which it is properly inferable that a strict compliance with the require-

⁷³ 77 N. Y. 483. See notes 1-7.

⁷⁴ *Cornell v. Le Roy*, 9 Wend. (N. Y.) 163, 1 Bennett, Fire Ins. Cas. 408; *Turner v. Fidelity & Casualty Co.*, 112 Mich. 425, 38 L. R. A. 529; *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330, 7 L. R. A. 81.

ments of a policy will not be insisted upon.⁷⁵ So where the delay was caused by acts of the insurer which justified the insured in believing that the loss would be settled and adjusted without furnishing proofs.⁷⁶ A letter from the insurer to a claimant under a policy of insurance asking that the matter be allowed to rest until the adjuster of the company can see the claimant or his attorney constitutes a waiver of the clause limiting the time for furnishing proofs.⁷⁷ Where a policy provides that within sixty days after a loss the insured should furnish proofs of loss, and, if required, information as to other matters and an official certificate of the same, and an insufficient proof of the loss was furnished and retained by the insurer until within two or three days prior to the expiration of the sixty days, when it objected thereto and demanded that the insured furnish the particulars required by the policy and also the information and certificate which the insured is required to furnish upon demand, the action of the insurer in confusing its demands and failing to warn the insured that he had less time in which to furnish the particulars required by the policy absolutely than to furnish those not required until demanded, is a waiver of the sixty-day limit.⁷⁸

WAIVER OF INSUFFICIENCY.

§ 193. The retention by the insurer, without objection, of notice or proofs furnished in proper time, is a waiver of any objection to their sufficiency; and the insistence of the insurer upon specified objections to their sufficiency is a waiver of all other objections which might be made.

⁷⁵ *Argall v. Old North State Ins. Co.*, 84 N. C. 355.

⁷⁶ *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330, 7 L. R. A. 81; *Phoenix Ins. Co. v. Levy*, 12 Tex. Civ. App. 45, 33 S. W. 992.

⁷⁷ *Turner v. Fidelity & Casualty Co.*, 112 Mich. 425, 38 L. R. A. 529.

⁷⁸ *McCarvel v. Phenix Ins. Co.*, 64 Minn. 193.

§ 194. Objections to the sufficiency of notice or proofs must

(a) Be made promptly.

(b) Be stated clearly and distinctly.

The law governing the waiver of the sufficiency or insufficiency of notice or proofs is mainly based upon the doctrine of estoppel. There is this difference between the failure to furnish proofs or notice within the prescribed time, and the failure to furnish them in the prescribed form, though within the prescribed time, to-wit: in the latter case the insured has not absolutely defaulted, and it may be that the errors or omissions can be corrected and the necessary information obtained and furnished to the insurer within the proper time; while in the former case, the insured will have lost all his rights unless the insurer has prevented or waived compliance. The law requires of the insurer entire good faith and fair dealing in its transactions with the insured, and hence the insurer is bound to promptly advise the insured of any defects of a formal character in the proofs or notice furnished in season, to the end that the assured may have an opportunity to correct them. If the insurer accepts those served within the time mentioned in the policy, without objection, it will be deemed to have waived the defects therein, and to have received them in performance of the conditions of the contract.⁷⁹

An insured has the right to assume, until advised to the contrary, that the proofs of loss served by him were sufficient.⁸⁰ The real motive inducing the insurer to act or to remain silent when proofs are furnished, is immaterial on the question of waiver. The insurer must be held to have in-

⁷⁹ *Welsh v. London Assur. Corp.*, 151 Pa. St. 607; *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 566; *Wicking v. Citizens' Mut. Fire Ins. Co.*, 118 Mich. 640, 77 N. W. 278; *Gristock v. Royal Ins. Co.*, 84 Mich. 161, 47 N. W. 549, 87 Mich. 428, 49 N. W. 634.

⁸⁰ *American Cent. Ins. Co. v. Sweetser*, 116 Ind. 370.

tended the natural and ordinary consequences of his own act and to have anticipated that the insured would rely thereon.⁸¹

The conditions of insurance policies requiring proofs of loss are liberally construed in favor of the insured, and if he in good faith, and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy respecting proofs of loss, good faith requires that the insurer shall promptly notify him of any objections thereto so as to give him an opportunity to obviate them; and mere silence may so mislead him to his disadvantage as to be in itself sufficient evidence of waiver by estoppel.⁸² And the same rule applies in case of failure of the insured to attach to his proofs the certificate of a designated magistrate or notary public, where the policy requires this to be done, and to any defects in the certificate furnished.⁸³ The rules governing waiver of proofs or of defects in proofs are applicable to mutual benefit societies as well as to ordinary insurance companies.⁸⁴

Waiver of Sufficiency — Cases.

Defects in proofs of loss are waived by the failure of the insurer to object thereto, although it does not admit any liability;⁸⁵ where an insurer in response to a notice of loss, sent

⁸¹ *Gray v. Blum*, 55 N. J. Eq. 553, 38 Atl. 646, and ante, note 3.

⁸² *Welsh v. London Assur. Corp.*, 151 Pa. St. 607; *Bartlett v. Union Mut. Fire Ins. Co.*, 46 Me. 500; *Green v. Des Moines Fire Ins. Co.*, 84 Iowa, 135, 50 N. W. 558; *Gould v. Dwelling-House Ins. Co.*, 134 Pa. St. 588; *Harrison v. German American Fire Ins. Co.*, 67 Fed. 577.

⁸³ *Turley v. North American Fire Ins. Co.*, 25 Wend. (N. Y.) 374, 2 Bennett, Fire Ins. Cas. 50; *Cayon v. Dwelling-House Ins. Co.*, 68 Wis. 510, 32 N. W. 540; *Paltrovitch v. Phoenix Ins. Co.*, 143 N. Y. 73. 25 L. R. A. 198; *Mercantile Ins. Co. v. Holthaus*, 43 Mich. 423.

⁸⁴ *Stambler v. Order of Pente*, 159 Pa. St. 492.

⁸⁵ *National Acc. Soc. v. Taylor*, 42 Ill. App. 97; *Welsh v. London Assur. Corp.*, 151 Pa. St. 607.

to the insured a blank apparently designed to be used in preparing proofs of loss, and the insured filled out such blank and returned it to the insurer, who retained it without objecting to its sufficiency, the latter will be estopped to claim that the proofs were not itemized in detail as required by the policy;⁸⁶ and the retaining of an insurance policy by the insurer without notifying the insured of its terms, estops the insurer from claiming non-compliance with the provisions of the policy regulating the form and contents of such proofs of loss;⁸⁷ and an informal statement concerning the loss given by the insured to an adjusting agent of the insurer, who delivers it to his principal, which fails to demand further or formal proofs, is sufficient.⁸⁸ Imperfect proofs of loss received and retained by the insurer without objection, will be held sufficient, even though the conditions in the policy are explicit as to the form and contents of proofs, and though the policy provides that no condition or clause in the policy shall be altered or waived except by writing indorsed on or annexed to the policy and signed by the president or secretary.⁸⁹ Retention by the insurer of defective proofs of loss without objection is a waiver of defects in the description of other insurance upon the property;⁹⁰ the acknowledgment by the insurer of notice of the death of an insured and its refusal to furnish blanks for the making of proper proofs upon the ground that the policy is forfeited, waives the making of any further

⁸⁶ *Bromberg v. Minnesota Fire Ass'n*, 45 Minn. 318.

⁸⁷ *American Cent. Ins. Co. v. Simpson*, 43 Ill. App. 98; *Bennett v. Maryland Fire Ins. Co.*, 14 Blatchf. 422, Fed. Cas. No. 1,321.

⁸⁸ *Brock v. Des Moines Ins. Co.*, 106 Iowa, 30, 75 N. W. 863.

⁸⁹ *Blake v. Exchange Mut. Ins. Co.*, 12 Gray (Mass.), 265, 4 Ben-
nett, Fire Ins. Cas. 306; *Gerard F. & M. Ins. Co. v. Frymier* (Tex.
Civ. App.), 32 S. W. 55; *Karelsen v. Sun Fire Office*, 45 Hun (N. Y.),
144.

⁹⁰ *Jones v. Howard Ins. Co.*, 117 N. Y. 103.

proofs.⁹¹ Defects in proofs of loss furnished by the insured are waived by the insurer without objection acting thereon and investigating the loss;⁹² and by the insurer negotiating thereafter with the insured concerning an adjustment and demanding a submission to arbitration free from any of the conditions of the policy;⁹³ and by the agent of the insurer thereafter examining the insured and procuring bills and invoices of the goods destroyed.⁹⁴

Denial of Liability.

Acts or conduct of the insurer which will operate as a waiver of all notice or proofs will also operate as a waiver of defects in those furnished. For example, the refusal by an insurance company within the time for furnishing proofs to pay the full amount stated in the policy upon the sole ground that the insured was injured in an occupation more hazardous than that in which he was insured, is a waiver of the right to object to the sufficiency of the proofs served.⁹⁵

Objections Must be Made Promptly.

Defects in form or particulars of proofs of loss furnished by the insured are waived unless seasonably objected to.⁹⁶

⁹¹ *Evarts v. United States Mut. Acc. Ass'n*, 16 N. Y. Supp. 27.

⁹² *Biddeford Sav. Bank v. Dwelling-House Ins. Co.*, 81 Me. 566; *German Ins. Co. v. Gray*, 43 Kan. 497, 8 L. R. A. 70.

⁹³ *Connecticut Fire Ins. Co. v. Hamilton (C. C. A.)*, 59 Fed. 258; *Hamilton v. Phoenix Ins. Co. (C. C. A.)*, 61 Fed. 379.

⁹⁴ *Merchants' Ins. Co. v. Reichman (Tex. Civ. App.)*, 40 S. W. 831; *Roberts v. Northwestern Nat. Ins. Co.*, 90 Wis. 210, 62 N. W. 1048.

⁹⁵ *Standard L. & A. Ins. Co. v. Koen*, 11 Tex. Civ. App. 273, 33 S. W. 133; *Lampkin v. Travelers' Ins. Co.*, 11 Colo. App. 249, 52 Pac. 1040; *Commercial Union Assur. Co. v. State*, 113 Ind. 331; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492 (Gil. 393); *National Masonic Acc. Ass'n v. Day*, 55 Neb. 127, 75 N. W. 576; *Heidenreich v. Aetna Ins. Co.*, 26 Or. 70.

⁹⁶ *Hamilton v. Connecticut Fire Ins. Co.*, 46 Fed. 42.

Thus, a retention of proofs for fifty days without objection, and then returning them as insufficient, without assigning any specific objection, has been held sufficient upon which to base a finding of waiver of any defects.⁹⁷ The provision of a policy that the loss is to be payable sixty days after notice and proof thereof has been received by the insurer does not give the company sixty days in which to object to proofs of loss. Objection must be made within a reasonable time. The question of what is a reasonable time is a question of law for the court in two classes of cases, to-wit: (1) "Transactions which happen in the same way, day after day, and present the question of reasonable time on the same data in continually recurring instances, so that by a series of decisions of the (2) Where the time taken is so clearly reasonable or unreasonable that there can be no room for doubt as to the proper answer to the question. Where, however, the answer to the question is one dependent on many different circumstances which do not constantly recur in other cases of like character, and with respect to which no certain rule of law has heretofore been laid down, or could be laid down, the question is one of fact for the jury."⁹⁸

A delay by the insurer of thirty-seven days in demanding a certificate of the magistrate nearest the fire, is not necessarily a waiver of such certificate;⁹⁹ and a retention of a notarial certificate accompanying proofs of loss for twenty-three days without objection is a waiver of the objection that the notary certifying was not the nearest notary and is a waiver of the right to demand another or further certificate;¹⁰⁰ and a delay

⁹⁷ *Davis Shoe Co. v. Kittanning Ins. Co.*, 138 Pa. St. 73.

⁹⁸ *Hamilton v. Phoenix Ins. Co. (C. C. A.)*, 61 Fed. 379; *Dwelling-House Ins. Co. v. Dowdall*, 159 Ill. 179.

⁹⁹ *Williams v. Queen's Ins. Co.*, 39 Fed. 167.

¹⁰⁰ *Paltrovitch v. Phoenix Ins. Co.*, 143 N. Y. 73, 25 L. R. A. 198.

of five weeks has been held good ground upon which to base a finding of a waiver;¹⁰¹ and retaining them without objection until the trial of an action upon the policy;¹⁰² and for eighty-six days;¹⁰³ and for forty-eight days;¹⁰⁴ and for three months.¹⁰⁵

Where an insurer retains proofs of loss for ten days without objection, and afterwards gives them to its agent with instructions to investigate and adjust the loss, it waives any objections to the sufficiency of the proofs served, and it is immaterial if the agent afterwards returns such proofs to the insured with the objection that they are insufficient in form and were not served in time, if amended proofs are afterwards and within a reasonable time tendered by the insured.¹⁰⁶ The fact that when the proofs were received there remained but three days of the period specified in the policy, which time might not prove sufficient to enable the insured to obviate the defects, will not relieve the insurer from the obligation to promptly object to any defects and to give him any opportunity.¹⁰⁷ The making of specific objections to proofs of loss served by the insured does not waive the furnishing of proofs.¹⁰⁸ The retention by the insurer of proofs furnished in compliance with one condition of the policy is not a waiver of the condition of the policy requiring the furnishing of a certificate of the magistrate or notary living nearest the fire.¹⁰⁹

¹⁰¹ *Keeney v. Home Ins. Co.*, 71 N. Y. 396. See, also, *Jefferson v. German-American Mut. Life Ass'n*, 69 Mo. App. 126; *McCarvel v. Phenix Ins. Co.*, 64 Minn. 193.

¹⁰² *Vangindertaelen v. Phenix Ins. Co.*, 82 Wis. 112, 51 N. W. 1122; *Grand Lodge v. Besterfield*, 37 Ill. App. 522.

¹⁰³ *Weiss v. American Fire Ins. Co.*, 148 Pa. St. 349, 23 Atl. 991.

¹⁰⁴ *Capitol Ins. Co. v. Wallace*, 48 Kan. 400, 29 Pac. 755.

¹⁰⁵ *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553.

¹⁰⁶ *Haggard v. German Ins. Co.*, 53 Mo. App. 98.

¹⁰⁷ *Gould v. Dwelling-House Ins. Co.*, 134 Pa. St. 570.

¹⁰⁸ *Sheehan v. Southern Ins. Co.*, 53 Mo. App. 351.

¹⁰⁹ *Lane v. St. Paul F. & M. Ins. Co.*, 50 Minn. 227.

Objections Must be Clear and Specific.

If the insurer deems the proofs furnished insufficient, and desires further or amended proofs, it should point out in its objections, the defects which it desires to have overcome and the omissions which ought to be supplied. An objection made by an insurer that the proofs furnished were deficient both in form and substance, without pointing out the specific defects relied on, is too general to impose upon the insured the duty of furnishing other proofs.¹¹⁰ So is the general objection that they are not in conformity with the policy, without specifying particular defects.¹¹¹ But an objection to the sufficiency of the proofs, together with a reference to the specific conditions of the policy which set forth what the proofs must contain, is sufficient.¹¹² The making of a specific objection to proofs of loss is an effectual waiver of all other objections which might have been made. Thus where the only objection made by the insurer upon receipt of proofs was that they did not include a certain certificate which the insured had the right to furnish later, the objection that they were not furnished in time was waived.¹¹³ And an objection to proofs

¹¹⁰ *Myers v. Council Bluffs Ins. Co.*, 72 Iowa, 176, 33 N. W. 453.

¹¹¹ *Virginia F. & M. Ins. Co. v. Goode*, 95 Va. 762; *Pratt v. New York Cent. Ins. Co.*, 55 N. Y. 505; *Gould v. Dwelling-House Ins. Co.*, 134 Pa. St. 570; *Smith v. Home Ins. Co.*, 47 Hun (N. Y.), 30; *Schmurr v. State Ins. Co.*, 30 Or. 29, 46 Pac. 363; *Gnau v. Masons' Fraternal Acc. Ass'n*, 109 Mich. 527, 67 N. W. 546.

Notice to the insured to comply strictly with the terms of the policy is not notice to furnish a certificate of a magistrate or notary public which need be furnished only if required. *Morgan v. Sun Ins. Office*, 176 Pa. St. 579.

¹¹² *Gauche v. London & L. Ins. Co.*, 4 Woods (U. S.), 102, 10 Fed. 347.

¹¹³ *Badger v. Glens Falls Ins. Co.*, 49 Wis. 389, 5 N. W. 845; *Western Home Ins. Co. v. Richardson*, 40 Neb. 1, 58 N. W. 597; *Moore v. Hanover Fire Ins. Co.*, 71 Hun (N. Y.), 199.

solely upon the ground that the amount claimed therein is in excess of an award made under the provisions of the policy, is a waiver of any other defects in the proofs.¹¹⁴

AMENDED OR ADDITIONAL PROOFS.

§ 195. If the original proofs are furnished after the expiration of the time fixed by the policy, and the insurer objects to their sufficiency and requires further proofs, these latter may be furnished within a reasonable time thereafter. This being done, the insurer will be estopped to assert the primary delay. But if the original proofs furnished within the prescribed time are fatally defective, and the insurer promptly objects to their sufficiency and points out the particulars in which they are insufficient, the insured must then serve corrected or supplemental proofs overcoming all valid objections made, and he must do this within the time fixed by the policy for the furnishing of proofs.

The contract of insurance embodies the full measure of the rights and obligations of both the insurer and insured, and, except in particulars wherein non-compliance is waived or excused by law, each is entitled to insist upon full performance by the other. Neither party can by his own act diminish his own liability or deprive the other of any contractual right. Unless the insurer has expressly or impliedly waived its right to insist upon the full and complete performance by the insured of the conditions regulating the contents of proofs and the time of their service, the latter must render full compliance therewith. The insured may by delay in furnishing his proofs lose all his rights under the policy, but this delay is waived by the insurer when it objects to the sufficiency of overlate proofs, and requires the insured to supply further or additional proofs. Or if the insured in good faith and in attempted compliance with the requirements of the policy

¹¹⁴ *Levine v. Lancashire Ins. Co.*, 66 Minn. 138; *First Nat. Bank v. American Cent. Ins. Co.*, 58 Minn. 492.

seasonably furnishes proofs which are insufficient and incomplete, the insurer will be held to have waived all defects to which it does not promptly and properly object. This much the law requires the insurer to do as an evidence of its good faith and fair dealing. But nothing more is required of the insurer in this regard; and, this duty discharged by it, the insured must then do what the policy requires him to do, and within the prescribed time. Nor is the insured excused from discharging this duty by reason of the impossibility of further performance within the stipulated time. He is conclusively presumed to know the conditions of his policy and what, if anything, is unconditionally required to be furnished with and stated in the proofs, and what the insurer could insist upon his doing, and within what time he must do it. He cannot extend the time for furnishing proper proofs by delay in the furnishing of defective proofs. Prompt action on his part and an honest attempt at compliance by him would have shifted the responsibility of taking the next step upon the insurer. The fact that when the defective proofs were received there might not remain time to obviate and remedy the defects, would not relieve the insurer from its obligation to give him the opportunity so to do. Valid objections, promptly and properly made by the insurer, to defective proofs furnished in proper time, can only be overcome by new or additional proofs complained of, and these latter must be furnished within the time limited in the policy.¹¹⁵

ditional proofs which supply the omissions and remedy the

The insurer must make its objections to the defective proofs clearly and explicitly and in a manner not calculated to confuse or mislead the insured. Thus by mixing up indiscriminately in an objection to proofs furnished and a demand for

¹¹⁵ Gould v. Dwelling-House Ins. Co., 134 Pa. St. 570; McCarvel v. Phenix Ins. Co., 64 Minn. 198; ante, Waiver of Delay and Defects.

further proofs, matters and information which the insured was unconditionally required to furnish and those which he was not required to furnish unless they were demanded, and by failing to warn the insured that he had less time to furnish the former than the latter, or that a failure to furnish the former within a certain time would cause a forfeiture, the insurer waives the limitation contained in the policy and gives to the insured a reasonable time in which to comply with all the demands.¹¹⁶

PROOFS NOT FURNISHED BY PROPER PERSON.

§ 196. The right of an insurer to insist upon proofs being furnished by a particular person may be waived by its retaining proofs furnished by some one else without questioning the right of the latter to furnish them.

If a person other than the one designated in the policy in good faith and with reasonable right or claim of right to act in the premises, attempts to comply with the provisions requiring the furnishing of proofs of loss, and pursuant thereto actually furnishes proofs to the insurer within proper time, the latter by retaining without objection proofs so furnished by one not entitled to furnish them, will be held to have waived all defects in the proofs and any rights it may have gained by reason of the failure of the proper party to furnish them.¹¹⁷ The refusal of the insurer to receive proofs offered and served by one not entitled to furnish them, does not operate as a waiver of any other defenses to an action on the policy, e. g. the defense that the policy had been avoided by the com-

¹¹⁶ *McCarvel v. Phenix Ins. Co.*, 64 Minn. 198.

¹¹⁷ *Morotock Ins. Co. v. Cheek*, 93 Va. 8, 24 S. E. 464; *Weed v. Hamburg-Bremen Fire Ins. Co.*, 133 N. Y. 394; *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 566; *State Ins. Co. v. Maackens*, 38 N. J. Law, 564; *Wilson v. Northwestern Mut. Acc. Ass'n*, 53 Minn. 470; *Brock v. Des Moines Ins. Co.*, 106 Iowa, 30, 75 N. W. 683. See ante, "Who Can Furnish Proofs."

mencement of mortgage foreclosure proceedings against the property insured without the written consent of the insurer.¹¹⁸ Where a policy made payable to another than the insured as collateral security, provides that in case of loss proofs shall be made by the original assured, who after a loss refuses to make proofs, whereupon the mortgagee furnishes proofs to the insurer, who retains them with the objection that they are not in accordance with the conditions of the policy, the mortgagee is not bound to furnish additional proofs.¹¹⁹

SILENCE OF INSURER.

§ 197. An insurer is under no obligation to do or say anything to make a forfeiture effectual.

§ 198. Silence operates as an assent and creates an estoppel only where it violates a duty to speak and at the same time has the effect to mislead and prejudice the one to whom this duty was owed.

The insurer is under no obligation to furnish blank proofs of loss or to demand proofs. The conditions requiring service of proofs of loss are found in the policy, and the insured is conclusively presumed to know what obligations in this respect the policy imposes upon him. When a loss occurs the insured is bound to know what he must do; and the insurer is under no obligation to notify him that proofs must be given or that he has omitted to give proofs within the proper time. The performance of the conditions is not a thing to be done at the request of the insurer. The company may remain silent, and until proofs are furnished it cannot be called upon to pay the loss. In discussing the question of the waiver

¹¹⁸ *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 566.

¹¹⁹ *Pratt v. New York Cent. Ins. Co.*, 55 N. Y. 505; *Findeisen v. Metropole Fire Ins. Co.*, 57 Vt. 520; *Rumsey v. Phoenix Ins. Co.*, 17 Blatchf. (U. S.) 527, 1 Fed. 396; *Eliot Five Cents Sav. Bank v. Commercial Union Assur. Co.*, 142 Mass. 142; *Keeney v. Home Ins. Co.*, 71 N. Y. 396.

of the insufficiency of proofs, we have seen that the law requires of the insurer entire good faith and fair dealing in its transactions with the insured in reference to notice and proofs, and that it is the duty of the insurer to call the attention of the insured to any defects in notice or proofs served in proper time, so as to give the insured an opportunity to correct any formal defects. The reasons for that rule are good and founded on principles of justice; but where the insured has neglected to furnish notice or proofs within the time fixed by the policy and in consequence thereof his right to recovery is gone, the reasons for the rule do not exist. *Cessante ratione legis cessat ipsa lex.*

If notice or proofs are not served within the prescribed time, and the insurer has done nothing to influence the omission, so the insured has lost all his rights under the policy, the insurer is not bound to object to the sufficiency of notice or proofs served thereafter, nor to point out any defects therein. Its silence then does not constitute a waiver; and does not estop it from insisting, in the defense of an action upon the policy, upon all the defenses it may have. An insurer is not required to do or say anything to make a forfeiture effectual. Silence operates as an assent and creates an estoppel only where it violates the duty to speak and at the same time has the effect to mislead and prejudice the party who was entitled to have that duty discharged.¹²⁰

¹²⁰ *Brown v. London Assur. Corp.*, 40 Hun (N. Y.), 107; *Brink v. Hanover Fire Ins. Co.*, 80 N. Y. 108, 70 N. Y. 593; *Bennett v. Lycoming County Mut. Ins. Co.*, 67 N. Y. 274; *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 566; *Johnson v. American Ins. Co.*, 41 Minn. 399; *Daniels v. Equitable Fire Ins. Co.*, 50 Conn. 551; *Continental Ins. Co. v. Dorman*, 125 Ind. 189. See ante, Waiver of Sufficiency of Proofs.

If no word or act has been said or done by insurer to mislead insured or throw him off his guard, mere silence is not enough to sus-

A failure to give notice of loss which defeats the right of action for the insurance, is not waived by the retention of proofs of loss sent after the policy is dead, where the insurer gives notice of a denial of any liability under the policy.¹²¹ If the policy requires notice to be given within a reasonable time, or immediately, upon penalty of forfeiture, and if notice is unreasonably delayed without sufficient excuse, a failure by the insurer to object to a notice given after the rights of the insured have expired does not revive the rights of the insured.¹²² An insurer does not confess the full amount of loss as set forth in the proofs by failure to object to the proofs upon the ground of the amount of the loss set forth therein.¹²³

DENIAL OF LIABILITY.

§ 199. The extent to which a denial of liability by an insurer operates as a waiver of notice or proofs of loss, or both, depends upon the time and manner of the denial and the circumstances under which it is made. A waiver by denial of liability is not always irrevocable.

§ 200. A denial by an insurer of all liability under a policy, made within the time during which proofs might be furnished, and under such circumstances as to warrant the presumption that proofs will be useless, is a waiver of any proofs, and a waiver of defects in those already furnished.

The reason of this rule is that the law does not require any man to do a useless act, and that the insurer, by denying liabil-

tain the inference of waiver. *Mueller v. South Side Fire Ins. Co.*, 87 Pa. St. 399; *Rademacher v. Greenwich Ins. Co.*, 75 Hun (N. Y.), 83.

¹²¹ *Ermentrout v. Girard F. & M. Ins. Co.*, 63 Minn. 305, 30 L. R. A. 346; *Edwards v. Baltimore Fire Ins. Co.*, 3 Gill (Md.), 176, 2 Bennett, Fire Ins. Cas. 405.

¹²² *Trask v. State F. & M. Ins. Co.*, 29 Pa. St. 198; *Insurance Co. of North America v. Brim*, 111 Ind. 281; *Donahue v. Windsor County Mut. Fire Ins. Co.*, 56 Vt. 374; *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 179.

¹²³ *Kuznik v. Orient Ins. Co.*, 73 Ill. App. 201. See post, §§ 199, 200, "Denial of Liability."

ity while yet the insured has time to comply with the requirement of the policy, says in effect to the insured that it is fully acquainted with all the circumstances concerning the loss and has made up its mind that under no circumstances can the insured recover, and that the furnishing of proofs of loss will not avail him anything; hence the insured is justified in believing and acting upon the belief that further attempt to comply with the requirement of the policy concerning proofs is not desired by the insurer and would be unavailing. The provisions of a policy of insurance requiring proofs of loss to be furnished within a specified time as a condition precedent to the right of the insured to maintain an action on the policy, is waived by the refusal of the insurer to pay the loss and its denial of any liability to the insured made before the expiration of the time for furnishing proofs of loss.¹²⁴ An unqualified refusal by an insurer to pay a loss based upon acts within its own knowledge and made under such circumstances as to justify the insured in believing that service of proofs would be useless, is equivalent to an express agreement of waiver, even though the obligation to make such proofs is imposed by statute as well as by contract. And the fact that the insured sends the proofs after such a waiver is not material.¹²⁵

¹²⁴ *German Ins. Co. v. Frederick (C. C. A.)*, 58 Fed. 144.

¹²⁵ *Wilson v. Commercial Union Assur. Co.*, 51 S. C. 540, 29 S. E. 245; *Boyd v. Cedar Rapids Ins. Co.*, 70 Iowa, 325, 30 N. W. 585; *Marthinson v. North British & M. Ins. Co.*, 64 Mich. 372, 31 N. W. 291; *Hicks v. British America Assur. Co.*, 13 App. Div. 444, 43 N. Y. Supp. 623; *Harris v. Phoenix Ins. Co.*, 85 Iowa, 238, 52 N. W. 128; *Roberts v. Northwestern Nat. Ins. Co.*, 90 Wis. 210, 62 N. W. 1048; *Gerling v. Agricultural Ins. Co.*, 39 W. Va. 689; *Home Ins. Co. v. Boyd*, 19 Ind. App. 173, 49 N. E. 285; *Milwaukee Mechanics' Ins. Co. v. Winfield*, 6 Kan. App. 527, 51 Pac. 567; *Searle v. Dwelling House Ins. Co.*, 152 Mass. 263; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; *German Fire Ins. Co. v. Gueck*, 130 Ill. 345, 6 L. R. A. 835; *Hermann v. Niagara Fire Ins. Co.*, 100 N. Y. 411.

An accident insurance company, which, before the expiration of the time for furnishing proofs, refuses absolutely to pay any amount and denies all liability upon the ground that proper notice of disability was not given, cannot thereafter deny the right of the insured to recover for the full period of disability on the ground that in the proofs furnished a shorter period of disability was stated.¹²⁶ An insurer, who upon being notified of a loss, offers to pay a specified sum in full settlement therefor, and denies all liability for some of the articles upon the claim that they were not covered by the policy, waives the necessity of proofs of loss and authorizes the insured to sue at once.¹²⁷

Denial of Liability Because of Garnishment Pending.

A refusal by an insurer to settle with the insured or to fix the amount of liability, if any, during the pendency of garnishment proceedings will waive the furnishing of proofs only until such proceedings are terminated.¹²⁸

What Denial is a Waiver.

A refusal to pay a loss, or a denial of all liability, does not constitute a waiver of proofs, unless it is of such kind and made under such circumstances as to justify the inference that proofs would be unavailing.¹²⁹ If the general agent of the insurer after investigating the circumstances of the fire,

If the company has, prior to the death of the insured, declared the policy forfeited for the nonpayment of premium, his representatives are not required to show that proofs have been furnished. *Girard Life Ins., A. & T. Co. v. Mutual Life Ins. Co.*, 97 Pa. St. 15.

¹²⁶ *Hohn v. Inter-State Casualty Co.*, 115 Mich. 79, 72 N. W. 1105.

¹²⁷ *Commercial Fire Ins. Co. v. Allen*, 80 Ala. 571. But see *Milwaukee Mechanics' Ins. Co. v. Winfield*, 6 Kan. App. 527, 51 Pac. 567.

¹²⁸ *Merchants' & Mechanics' Ins. Co. v. Vining*, 68 Ga. 197.

¹²⁹ *Cornett v. Phenix Ins. Co.*, 67 Iowa, 388, 25 N. W. 673; *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621; *Phenix Ins. Co. v. Searles*, 100 Ga. 97.

notifies the insured that he cannot recommend payment of the loss and gives his reasons therefor, this is a sufficient denial of liability and a waiver of the right to insist upon the furnishing of proofs.¹³⁰ An insurer waives the furnishing of proofs of loss and defects in those already furnished, by notifying the beneficiary of its refusal to pay because of a breach of warranty or of misrepresentations avoiding the policy;¹³¹ or because the insured was engaged in a different occupation from that insured against;¹³² and by a denial of liability because the insured had not title to the property destroyed;¹³³ and by a denial of liability on the ground that the company had no risk on the property;¹³⁴ and by denying all liability under the policy without giving any reasons therefor.¹³⁵ Failure to furnish proofs of death, or the furnishing of defective proofs, is waived by the refusal of the company to pay on other grounds;¹³⁶ and by a denial of liability on the ground that the policy was void.¹³⁷ The withholding of an insurance policy after an oral preliminary contract to insure and the denial of the right of the insured to its issuance, is a waiver of the conditions in the policy requiring proofs of loss.¹³⁸ Proof of the

¹³⁰ *McBride v. Republic Fire Ins. Co.*, 30 Wis. 562.

¹³¹ *Lampkin v. Travelers' Ins. Co.*, 11 Colo. App. 249, 52 Pac. 1040.

¹³² *Standard L. & A. Ins. Co. v. Koen*, 11 Tex. Civ. App. 273, 33 S. W. 133.

¹³³ *German Fire Ins. Co. v. Gueck*, 130 Ill. 345, 6 L. R. A. 835; *Grange Mill Co. v. Western Assur. Co.*, 118 Ill. 396.

¹³⁴ *King v. Hekla Fire Ins. Co.*, 58 Wis. 508; *Brown v. London Assur. Corp.*, 40 Hun (N. Y.), 101; *Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co.*, 11 Colo. App. 264, 53 Pac. 242.

¹³⁵ *Virginia F. & M. Ins. Co. v. Goode*, 95 Va. 762, 30 S. E. 370.

¹³⁶ *Standard L. & A. Ins. Co. v. Thornton*, 97 Tenn. 1, 40 S. W. 136; *Jefferson v. German-American Mut. Life Ass'n*, 69 Mo. App. 126; *Dooley v. Hanover Fire Ins. Co.*, 16 Wash. 155, 47 Pac. 507.

¹³⁷ *Lancashire Ins. Co. v. Monroe*, 101 Ky. 12, 39 S. W. 434; *Aetna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125; *Robinson v. Pennsylvania Fire Ins. Co.*, 90 Me. 385.

¹³⁸ *Sproul v. Western Assur. Co.*, 33 Or. 98, 54 Pac. 180.

death of a member of a fraternal order, is waived by a denial of all liability on the part of the insurer and its refusal to pay the policy upon the ground that the deceased was not insured at the time of his death.¹³⁹ If the contract for insurance has been completed, but no policy has been issued prior to the fire, the subsequent refusal of the insurer to issue the policy and its denial of the contract, waives the furnishing of proofs.¹⁴⁰

In an action for breach of contract to insure property where no policy has been issued, the failure to make proofs of loss as required by the policy such as the one agreed upon would have been if issued, is no defense.¹⁴¹ But if the insured claims that the contract is in force, and brings his action upon the theory that he is insured under the policy usually issued by the insurer, he is bound by the conditions usually found in such policies; and the denial by the insurer after suit brought of any contract to insure, or the existence of any insurance, does not waive non-compliance by the insured.¹⁴²

What Denial Does Not Waive.

The rule that an insurer waives the furnishing of further proofs of loss, or of any proofs of loss thereafter, by a denial of liability, proceeds upon the doctrine of estoppel; and, while it is not always necessary that the insured should have relied and acted upon the denial of liability before the expiration of the time for furnishing proofs,¹⁴³ yet a denial of liability

¹³⁹ *Daniher v. Grand Lodge, A. O. U. W.*, 10 Utah, 110, 37 Pac. 245.

¹⁴⁰ *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390.

¹⁴¹ *Campbell v. American Fire Ins. Co.*, 73 Wis. 100, 40 N. W. 661; *Gold v. Sun Ins. Co.*, 73 Cal. 216; *American Cent. Ins. Co. v. Simpson*, 43 Ill. App. 98; *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 49 Cent. Law J. 467; *Unsell v. Hartford Life & Annuity Ins. Co.*, 32 Fed. 443; *Sproul v. Western Assur. Co.*, 33 Or. 98, 54 Pac. 180.

¹⁴² *Barre v. Council Bluffs Ins. Co.*, 76 Iowa, 609, 41 N. W. 373.

¹⁴³ *Wilson v. Commercial Union Assur. Co.*, 51 S. C. 540, 29 S. E. 245.

or a refusal of the insurer to pay does not constitute a waiver of either notice or proofs of loss or defects in those already furnished, unless made under such circumstances, and at such a time, and in such a manner, as to warrant and justify the insured in believing that proofs of loss are not desired and will not be required and if furnished would be unavailing.¹⁴⁴ The furnishing of proofs is not waived by the refusal of an adjuster to pay the full amount of a policy upon the ground that the insured had made false representations in his application for insurance and that he had burned the property, coupled with the assertion that the insured must furnish the proofs according to the terms of the policy.¹⁴⁵ An insurer does not waive its right to demand proofs of loss, or the production of invoices, or an inspection of books and papers, by denying liability for a portion of the articles contained in the inventory of destroyed property furnished by the insured.¹⁴⁶ And proofs are not waived under a Michigan standard policy by a statement of the adjuster to the insured that his company would not settle upon basis of settlement and arbitration agreed to by other companies having insurance on the same property.¹⁴⁷ The refusal by the adjuster of an insurer to pay the full amount of a policy upon the ground that the as-

¹⁴⁴ *Peoples' Bank v. Aetna Ins. Co.* (C. C. A.), 74 Fed. 507; *Equitable Life Assur. Soc. v. Winning* (C. C. A.), 58 Fed. 541; *Phoenix Ins. Co. v. Minner*, 64 Ark. 590, 44 S. W. 75; *Cornett v. Phenix Ins. Co.*, 67 Iowa, 388, 25 N. W. 673; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 419; *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 563; *Ermentrout v. Girard F. & M. Ins. Co.*, 63 Minn. 305, 65 N. Y. 635, 30 L. R. A. 346; *Weidert v. State Ins. Co.*, 19 Or. 261; *Engebretson v. Hekla Fire Ins. Co.*, 58 Wis. 301; *Blossom v. Lycoming Fire Ins. Co.*, 64 N. Y. 166.

¹⁴⁵ *Phoenix Ins. Co. v. Minner*, 64 Ark. 590, 44 S. W. 75.

¹⁴⁶ *Milwaukee Mechanics' Ins. Co. v. Winfield*, 6 Kan. App. 527, 51 Pac. 567.

¹⁴⁷ *Wadhams v. Western Assur. Co.*, 117 Mich. 514, 76 N. W. 6.

sured made false statements in his application for insurance and that he was guilty of incendiarism, does not waive the furnishing of proofs according to the terms of the policy.¹⁴⁸

Retraction of Waiver by Denial.

The doing by the insurer of an act which in law amounts to a waiver of proofs will not estop it from subsequently demanding and requiring the insured to furnish proofs, provided the latter has not acted upon the waiver, so that its withdrawal will leave him in a worse position than he would otherwise have occupied, and provided also there still remains a reasonable opportunity to furnish proofs before the expiration of the time fixed by the policy.¹⁴⁹ Otherwise if the insured had acted upon the waiver so that he will be prejudiced by its retraction.¹⁵⁰ Thus the furnishing of preliminary proofs of loss is not waived by the refusal of the adjuster to settle a loss and his statement that the loss would not be paid because of a change in the use of the building insured contrary to the terms of the policy, where the general agent of the insurer within the time limited for the furnishing of proofs, and while the insured yet had time to comply with the require-

¹⁴⁸ *Phoenix Ins. Co. v. Minner*, 64 Ark. 590, 44 S. W. 75; *Citizens' Fire Ins., S. & L. Co. v. Doll*, 35 Md. 89. See, also, *Robinson v. Pennsylvania Fire Ins. Co.*, 90 Me. 385; *Welsh v. London Assur. Corp.*, 151 Pa. St. 607; *New York Life Ins. Co. v. Eggleston*, 96 U. S. 572; *Agricultural Ins. Co. v. Potts*, 55 N. J. Law, 158; *Wheaton v. North British & M. Ins. Co.*, 76 Cal. 415; *Devens v. Mechanics' & Traders' Ins. Co.*, 83 N. Y. 168.

¹⁴⁹ *Hahn v. Guardian Assur. Co.*, 23 Or. 576, 32 Pac. 683; *Scottish U. & N. Ins. Co. v. Clancy*, 71 Tex. 5; *Joyce, Ins.* § 3371; *Gauche v. London & L. Ins. Co.*, 4 Woods (U. S.), 102, 10 Fed. 347; *Farmers' Fire Ins. Co. v. Mispelhorn*, 50 Md. 180; *Williams v. Queen's Ins. Co.*, 39 Fed. 167; *Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286; *Phenix Ins. Co. v. Searles*, 100 Ga. 97; *Findeisen v. Metropole Fire Ins. Co.*, 57 Vt. 520; *Phoenix Ins. Co. v. Minner*, 64 Ark. 590, 44 S. W. 75.

¹⁵⁰ *German Ins. Co. v. Gibson*, 53 Ark. 494.

ments of the policy, demanded proofs of loss and with his demand inclosed suitable blanks therefor.¹⁵¹

And a letter by the secretary of the insurer to a policyholder who claimed to have suffered a loss under the terms of the policy, in which letter the secretary stated that, after investigation, he considered the claim invalid, but that the insured could reopen the case and make proofs of loss, and specifying what the proofs must contain, does not constitute a waiver where such letter was written and received while yet there was time to furnish proofs of loss.¹⁵² Proofs of loss are not waived by the special agent of an insurer refusing to pay the loss and stating to the insured that he neither admitted nor denied the company's liability, where a stipulation was subsequently made between the insured and the insurer that such agent should examine the facts concerning the loss without waiving any of the terms of the policy.¹⁵³

SAME — AFTER TIME TO FURNISH PROOFS HAS EXPIRED.

§ 201. The denial of liability by an insurer and its refusal to pay (a loss under a policy) which will amount to a waiver of notice or proof, must be made within the time in which notice or proof can under the policy be furnished.

There is no waiver of proofs of loss by a denial of liability made by the insurer after the time for furnishing proofs has expired. This is true whether the policy requires proofs to be furnished within a stated time, or immediately, or within a reasonable time.¹⁵⁴ The clear reason for this rule is that while, within the time limited, the insurer's conduct may be

¹⁵¹ Hahn v. Guardian Assur. Co., 23 Or. 576, 32 Pac. 683.

¹⁵² Welsh v. Des Moines Ins. Co., 77 Iowa, 376, 42 N. W. 324; Bennett v. Lycoming County Mut. Ins. Co., 67 N. Y. 274.

¹⁵³ Insurance Co. of North America v. Caruthers (Miss.), 16 So. 911.

¹⁵⁴ Edwards v. Baltimore Fire Ins. Co., 3 Gill (Md.), 176, 2 Bennett, Fire Ins. Cas. 405; Smith v. Haverhill Mut. Fire Ins. Co., 1 Allen (Mass.), 297; Trask v. State F. & M. Ins. Co., 29 Pa. St. 193;

such as to lead the insured to believe that no compliance would be required or be deemed material, and but for such conduct the insured might have rendered full compliance; yet if the specified time has elapsed, and the insured has failed to comply with the requirements of the policy, and has thereby lost all his rights without the fault of the insurer, its subsequent conduct, short of an express agreement to waive, or a distinct recognition of liability acted upon by the insured to his injury, would be of no effect; for they could work no possible harm to the insured who has already lost all his rights.¹⁵⁵ The conduct of an adjusting agent for an insurer after the expiration of the time limited for furnishing proofs of loss cannot be relied on as a waiver of the failure to furnish proofs within the required time.¹⁵⁶

SAME — IN ANSWER.

§ 202. Defendant insurance company waives nothing by asserting all possible defenses when sued.

An insurance company is entitled, when sued upon the policy, to assert as many defenses as it has under the law, provided they are not inconsistent with each other; and the

Insurance Co. of North America v. Brim, 111 Ind. 281; *Killips v. Putnam Fire Ins. Co.*, 28 Wis. 472; *Employers' Liability Assur. Corp. v. Rochelle*, 13 Tex. Civ. App. 232, 35 S. W. 869. See, also, ante, §§ 197, 198, "Silence." Compare *Johnson v. Dakota F. & M. Ins. Co.*, 1 N. D. 167, 45 N. W. 799; *Fink v. Lancashire Ins. Co.*, 60 Mo. App. 673.

¹⁵⁵ *Leigh v. Springfield F. & M. Ins. Co.*, 37 Mo. App. 542; *Beatty v. Lycoming County Mut. Ins. Co.*, 66 Pa. St. 9; *Erwin v. Springfield F. & M. Ins. Co.*, 24 Mo. App. 152; *Engbretson v. Hekla Fire Ins. Co.*, 58 Wis. 301; *Ermentrout v. Girard F. & M. Ins. Co.*, 63 Minn. 305, 30 L. R. A. 346; *Blossom v. Lycoming Fire Ins. Co.*, 64 N. Y. 166; *Dwelling House Ins. Co. v. Jones*, 47 Ill. App. 261. See, also, cases cited to §§ 197, 198.

¹⁵⁶ *Albers v. Phoenix Ins. Co.*, 68 Mo. App. 543; *Smith v. State Ins. Co.*, 64 Iowa, 716, 21 N. W. 145; *Brown v. London Assur. Corp.*, 40 Hun (N. Y.), 101.

pleading in its answer that the insured has no right to recover, or that the insured has failed to comply with any of the conditions of a policy, or that the insured has violated any of the conditions of a policy, cannot be construed as a waiver of the failure of the insured to perform fully what the policy required him to do. The setting up of one defense cannot be construed as a waiver of another.

In a federal case it was contended that the insurer having by its answer denied all liability under the policy, and having also alleged the failure of the insured to comply with certain conditions precedent to a right of action, had by its formal plea waived the right to insist upon this non-compliance. The court said in substance: this denial of liability was not made until after the plaintiff had instituted this action, which under defendant's contention cannot be maintained. That the company has set up in one count of its answer a denial of any liability does not affect the case. It might waive any objection to the cause of the fire and offer to settle to avoid litigation, but this does not affect its right when sued to set up in its answer any and all legal defenses it has to the action.¹⁵⁷

¹⁵⁷ Kahnweiler v. Phoenix Ins. Co., 57 Fed. 562; Murphy v. Northern British & M. Co., 61 Mo. App. 333; Lane v. St. Paul F. & M. Ins. Co., 50 Minn. 227; La Plant v. Firemen's Ins. Co., 68 Minn. 82; Balmford v. Grand Lodge, A. O. U. W., 19 Misc. Rep. (N. Y.) 1; Yendel v. Western Assur. Co., 21 Misc. Rep. (N. Y.) 351; Armstrong v. Agricultural Ins. Co., 130 N. Y. 566; Trask v. State F. & M. Ins. Co., 29 Pa. St. 198. See, also, cases cited under section next preceding, and cases cited to section on "Silence." The contrary doctrine has been asserted in Omaha Fire Ins. Co. v. Hildebrand, 54 Neb. 306, 74 N. W. 589, 27 Ins. Law J. 730; Western Home Ins. Co. v. Richardson, 40 Neb. 1, 58 N. W. 597; Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co., 11 Colo. App. 264, 53 Pac. 242. And see Johnson v. Dakota F. & M. Ins. Co., 1 N. D. 167, 45 N. W. 799; Crenshaw v. Pacific Mut. Life Ins. Co., 71 Mo. App. 431.

NEGOTIATIONS FOR SETTLEMENT.

§ 203. The offer of an insurer to pay an amount less than that claimed by the insured by way of compromise and settlement of a loss, will not alone constitute a waiver.

But a waiver may be found when the acts and negotiations between insurer and insured are of such a nature

- (a) As to indicate the intention of the former to forego its right to require proofs,
- (b) And to induce the latter to neglect to furnish them.

Waiver by Negotiations.

The negotiations between the insurer and the insured after a loss looking towards a compromise or settlement are frequently of such a nature as to dispense with the furnishing of notice or proofs. We have already seen that if after a loss has occurred, the insured has furnished proofs of loss in attempted compliance with the policy, or if the insurer has prepared such proofs as it deems essential, the insured is entitled to assume until notified to the contrary that additional notice and proofs are not required.

It often happens that following the loss, the insurer investigates it, has communications and negotiations with the insured looking towards a settlement or adjustment of his claims, from which it might be inferable that the insurer did not desire or intend to require any notice or proofs to be furnished. The acts and negotiations which will constitute a waiver of notice or proofs must be of such a character and made under such circumstances as to reasonably indicate an intention on the part of the insurer to waive its rights to have notice or proofs or both furnished, and such as to reasonably induce the belief upon the part of the insured that the notice or proofs will be an unnecessary formality.¹⁵⁸ Any delay

¹⁵⁸ Robinson v. Pennsylvania Fire Ins. Co., 90 Me. 385; Eastern R. Co. v. Relief Fire Ins. Co., 105 Mass. 579; Brewer v. Chelsea Mut. Fire Ins. Co., 14 Gray (Mass.), 209; Blake v. Exchange Mut. Ins.

in the furnishing of notice or proofs reasonably induced by the conduct of the insurer in its negotiations for compromise or settlement cannot be taken advantage of by it.¹⁵⁹

Preliminary proofs of loss are waived by the insurer's sending its adjuster to the scene of the fire immediately thereafter with full power to adjust and settle the loss when the company had thereto been fully informed of the circumstances attending the fire and the adjuster attempts to obtain a settlement, the only question in dispute being the amount of the loss, and where the insurer takes possession of the damaged property and examines it for the purpose of ascertaining the amount and extent of damage, and by an adjuster's offering to pay a less amount than the face of the policy and making no other objection to a settlement and not intimating that the company would require any proofs;¹⁶⁰ and by the insurer, after it has knowledge of the loss, taking possession of the damaged property and the books of the insured and investigating the extent of the loss;¹⁶¹ and by the insurer referring the matter of a loss to its adjuster, who, having full power to investigate and settle, examines into the facts, negotiates with the insured for a compromise and leads the latter to believe that there is nothing in the way of a settlement except a difference of opinion as to the value of the property destroyed.¹⁶²

Co., 12 Gray (Mass.), 265; *Underhill v. Agawam Mut. Fire Ins. Co.*, 6 Cush. (Mass.) 440; *Fulton v. Phoenix Ins. Co.*, 51 Mo. App. 460; *Roberts v. Northwestern Nat. Ins. Co.*, 90 Wis. 210, 62 N. W. 1048; *Lake v. Farmers' Ins. Co.*, 110 Iowa, 473, 81 N. W. 711; *Gristock v. Royal Ins. Co.*, 87 Mich. 428, 49 N. W. 634, 84 Mich. 161, 47 N. W. 549; *Wright v. London Fire Ins. Ass'n*, 12 Mont. 474, 19 L. R. A. 211.

¹⁵⁹ *Argall v. Old North State Ins. Co.*, 84 N. C. 355.

¹⁶⁰ *Phoenix Ins. Co. v. Levy*, 12 Tex. Civ. App. 45, 33 S. W. 992; *Mitchell v. Orient Ins. Co.*, 40 Ill. App. 111; *German Ins. Co. v. Gray*, 43 Kan. 497, 8 L. R. A. 70.

¹⁶¹ *St. Paul F. & M. Ins. Co. v. Gotthelf*, 35 Neb. 351, 53 N. W. 137.

¹⁶² *Hitchcock v. State Ins. Co.*, 10 S. D. 271, 72 N. W. 898; *George*

Contra — No Waiver.

But an offer of compromise made by the insurer after the expiration of the time for furnishing proofs of loss is no waiver of proofs of loss.¹⁶³ And a mere offer to pay less than the amount of the claim, cannot be regarded as a waiver of proofs or of any other legal right which the insurer might have.¹⁶⁴ Where a policy provides that no action taken preliminary to the adjustment of a claim to ascertain the amount and validity thereof shall be construed as a waiver of any of the rights of the company, the making of a statement of the property lost at the request of an adjuster who is investigating the loss does not dispense with the furnishing of proper proofs.¹⁶⁵ Nor does the offer of an agent and adjuster of the insurer to advise the payment of a certain sum in settlement of a loss when the offer is rejected by the insured, who is then told he must look to the policy for his remedy.¹⁶⁶ The furnishing of notice and proofs in accordance with the terms of a policy is not waived by the payment of a loss to the mortgagee of the insured property under an agreement between him and the insurer providing for a continuation of the policy, and for subrogation of the company to the mortgagee's rights

Dee & Sons Co. v. Key City Fire Ins. Co., 104 Iowa, 167, 73 N. W. 594; *Brock v. Des Moines Ins. Co.*, 106 Iowa, 30, 75 N. W. 683; *Perry v. Dwelling-House Ins. Co.*, 67 N. H. 291, 33 Atl. 731.

And any conduct of insurer in negotiating for settlement which justifies the insured in an expenditure of time and money, under the honest belief that there is an admission of liability and a desire and willingness of the insurer to make an equitable adjustment, is a waiver. *Wicking v. Citizens' Mut. Fire Ins. Co.*, 118 Mich. 640, 77 N. W. 278.

¹⁶³ *Leigh v. Springfield F. & M. Ins. Co.*, 37 Mo. App. 542.

¹⁶⁴ *Beatty v. Lycoming County Mut. Ins. Co.*, 66 Pa. St. 9.

¹⁶⁵ *Knudson v. Hekla Fire Ins. Co.*, 75 Wis. 198, 43 N. W. 954.

¹⁶⁶ *Flanaghan v. Phenix Ins. Co.*, 42 W. Va. 426; *Knudson v. Hekla Fire Ins. Co.*, 75 Wis. 198, 43 N. W. 954; *Engebretson v. Hekla Fire Ins. Co.*, 58 Wis. 301.

to the extent of the sum paid.¹⁶⁷ Thus where a policy required proofs of loss to be furnished within thirty days, and the evidence disclosed that the secretary of the insurer, after an informal notice of the total destruction of the building insured, went to the scene of the fire, viewed the ruins, obtained a carpenter's estimate for rebuilding, offered the insured a specified sum of money in settlement, marked certain items in the inventory furnished by the insured as articles for which the company was willing to pay, and entered into an agreement with the agent of another insurance company as to their respective *pro rata* shares of the loss, it is a question for a jury whether or not there was a waiver of proofs.¹⁶⁸

An adjuster's investigation into the circumstances of a fire, and his attempt to agree with the insured as to the amount of the loss, and his offer to pay a certain sum in full settlement, will not excuse the insured from furnishing proofs; but where the adjuster frequently visits the scene of the fire after the loss and makes repeated offers for compromise, and the only question ever raised is as to the amount for which the insurer was liable, it may be a question of fact for a jury to determine whether or not there was a waiver. "The company is not to be prejudiced in its defense because its agent promptly went to the scene of the fire, and pursued every allowable method of investigation of the loss, and tried ineffectually to come to an understanding with the insured. This would be to punish for an effort to perform duty. * *

¹⁶⁷ Hare v. Headley, 54 N. J. Eq. 545, 35 Atl. 445.

Before proofs were made, the company's adjuster went to the scene of the loss, made an investigation, and offered to settle it on terms which were rejected. Defective proofs were subsequently sent, and insured was promptly notified of the defects in them. He did nothing further towards perfecting them. Held, that there was no waiver. Liverpool, L. & G. Ins. Co. v. Sorsby, 60 Miss. 302.

¹⁶⁸ Susquehanna Mut. Fire Ins. Co. v. Staats, 102 Pa. St. 529. See note 68.

And an offer to pay a sum less than the amount claimed will not [alone] constitute a waiver. There must be more than this. * * * Waiver which rests upon the idea of estoppel cannot be predicated of mere performance of duty, or exercise of right, or offer of compromise by the insurer. * * * But where there were frequent negotiations and letters between the parties, and the only matter of difference was as to the value of the property damaged and how much the insurer should pay, it may be that the protracted negotiations and discussion between the parties during which the liability of the insured was assumed and recognized, and the only difference was as to the sum to be paid, was well calculated to mislead the average man into the belief that he need not make any further proof of loss than was known to the insured."¹⁶⁹

PROCEEDINGS TO ASCERTAIN OR ADJUST LOSS.

§ 204. The general rule is that notice and proofs of loss are unnecessary if the insurer examines the insured under oath, or demands an arbitration, or makes an adjustment of the loss.

Many policies contain express stipulations which avoid the application of this rule.

Examination of the Insured — General Rule.

In the absence of a contrary stipulation in the policy, the failure of the insured to furnish notice or proofs as required by the policy, and all objections to the sufficiency of proofs or notice which have been served, are waived by the insurer requiring an examination of the insured under oath according to the conditions of the policy.¹⁷⁰

¹⁶⁹ New Orleans Ins. Ass'n v. Matthews, 65 Miss. 301; Phenix Ins. Co. v. Searles, 100 Ga. 97, 27 S. E. 779; Scottish U. & N. Ins. Co. v. Clancy, 71 Tex. 5; Hanna v. American Cent. Ins. Co., 36 Mo. App. 538.

¹⁷⁰ Enos y. St. Paul F. & M. Ins. Co., 4 S. D. 639, 57 N. W. 919; Carpenter v. German American Ins. Co., 135 N. Y. 298; Vergeront v. German Ins. Co., 86 Wis. 425, 56 N. W. 1096; O'Brien v. Ohio Ins. Co., 52

When Regulated by Stipulations in Policy.

But where a policy expressly provides that the insured shall, whenever required, submit to an examination under oath and shall, if required, produce a certificate of the nearest magistrate as to the nature and amount of the loss, the mere examination of the insured by the insurer under the former provision is no waiver of the right of the insurer to thereafter require a compliance with the latter provision;¹⁷¹ nor where the policy provides that such act shall not constitute a waiver of any of the rights of the insurer to insist on compliance by the insured with all the terms of the policy, when the insurer expressly stated to the insured that in exercising its right to such examination, it did not intend to waive any rights under the policy.¹⁷² And an insurer does not waive a provision requiring the insured to exhibit to its adjuster the remnants of the property destroyed, by requiring an examination of the insured after the receipt of proofs of loss, where the policy provides in terms that no waiver shall arise because

Mich. 131, 17 N. W. 726; *Zielke v. London Assur. Corp.*, 64 Wis. 442; *Moore v. Protection Ins. Co.*, 29 Me. 97. In *Winnesheik Ins. Co. v. Schueller*, 60 Ill. 465, the policy provided that the assured should, if required, submit to a personal examination. The company did not ask for any examination till after the lapse of the thirty days in which the assured must prove his loss. Held: (1) that the examination was not a part of the proof of loss; (2) that, if it might at any time constitute a part of the proof of loss, it could not be insisted upon after the lapse of the thirty days; (3) that the company could not postpone such examination for the purpose of involving the assured in difficulties, and entrapping her into violation of the condition of the policy. Compare *Gauche v. London & L. Ins. Co.*, 4 Woods (U. S.), 102, 10 Fed. 347; *Lycoming County Ins. Co. v. Updegraff*, 40 Pa. St. 311; *Columbian Ins. Co. v. Lawrence*, 2 Pet. (U. S.) 53.

¹⁷¹ *Williams v. Queen's Ins. Co.*, 39 Fed. 167; *Lane v. St. Paul F. & M. Ins. Co.*, 50 Minn. 227.

¹⁷² *Phenix Ins. Co. v. Searles*, 100 Ga. 97, 27 S. E. 779.

of such examination.¹⁷³ In a Maryland case the conditions of the policy were that insured should forthwith give notice of loss in writing and as soon thereafter as possible deliver a particular account, exhibit his books, bills of purchase or duplicates thereof and other vouchers, submit to an examination under oath, etc. "And until such proofs, examinations, declarations, certificates and exhibits are produced, and permitted by the claimant, when required as above, the loss shall not be payable." Notice and preliminary proofs were furnished. The latter not being satisfactory, an agent demanded that insured should produce his bills of purchase, and upon being informed that these had been burned, demanded duplicates thereof, which were not produced. The company refused to pay the amount claimed, in the following letter, written in reply to one from the attorney of insured: "I am instructed to say that the F. F. I. C. will contest the payment of A. M.'s claim (in its present exaggerated form), under the terms and conditions of his policy, though we should have preferred an amicable compromise. The company is more impelled to this course as we cannot learn that the C. Co. on the same risk have or intend paying the claim as made. When they pay, this Co. will probably not delay longer. If, however, you prefer litigation with this Co., we shall contest the claim as above." Held, that this was not a waiver of the right to demand further preliminary proof.¹⁷⁴

Demand for Arbitration or Arbitrating.

Any notice or proof is waived by the insurer's demand for arbitration within the time for furnishing proofs of loss,¹⁷⁵ and by its entering into a submission to arbitration

¹⁷³ *Oshkosh Match Works v. Manchester Fire Assur. Co.*, 92 Wis. 510, 66 N. W. 525.

¹⁷⁴ *Farmers' Fire Ins. Co. v. Mispelhorn*, 50 Md. 180.

¹⁷⁵ *Pretzfelder v. Merchants' Ins. Co.*, 123 N. C. 164, 44 L. R. A. 424.

for the purpose of ascertaining the amount of the loss in accordance with another stipulation of the policy, without having received the proofs required;¹⁷⁶ and by the insurer entering into an agreement to pay what appraisers shall determine to be the amount of the loss.¹⁷⁷ The effect of these acts as a waiver is not lessened by the failure of the arbitration because of the inability of the arbitrators to agree without the fault of the insured.¹⁷⁸ Any defects in proofs furnished in proper time, are waived by the insurer thereafter negotiating with the insured concerning an adjustment of the loss and demanding a submission to arbitration free from any of the provisions or conditions not prescribed by the policy.¹⁷⁹

When Appraisal Must Accompany Proofs.

Where a policy provides for both an appraisal and proofs of loss and that appraisal shall accompany the proofs, the demanding of an appraisal by the insurer before the time to furnish proofs has expired, does not waive the furnishing of proofs.¹⁸⁰

Stipulations in Policy Regulating Effect of Arbitration.

Any notice or proof is waived by the insurer without objection joining in a submission to arbitration which is provided

¹⁷⁶ *Caledonian Ins. Co. v. Cooke*, 101 Ky. 412, 41 S. W. 279; *Rademacher v. Greenwich Ins. Co.*, 75 Hun (N. Y.), 83; *Southern Mut. Ins. Co. v. Turnley*, 100 Ga. 296, 27 S. E. 975; *Home Fire Ins. Co. v. Bean*, 42 Neb. 537; *London & L. Fire Ins. Co. v. Storrs*, 36 U. S. App. 327, 71 Fed. 127; *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 297; *Bammessel v. Brewers' Fire Ins. Co.*, 43 Wis. 463; *Walker v. German Ins. Co.*, 51 Kan. 725.

¹⁷⁷ *Snowden v. Kittanning Ins. Co.*, 122 Pa. St. 502.

¹⁷⁸ *Pretzfelder v. Merchants' Ins. Co.*, 123 N. C. 164, 44 L. R. A. 424; *Rademacher v. Greenwich Ins. Co.*, 75 Hun (N. Y.), 83.

¹⁷⁹ *Connecticut Fire Ins. Co. v. Hamilton* (C. C. A.), 59 Fed. 258; *Hamilton v. Phoenix Ins. Co.* (C. C. A.), 61 Fed. 379; *Home Fire Ins. Co. v. Bean*, 42 Neb. 537.

¹⁸⁰ *Hanna v. American Cent. Ins. Co.*, 36 Mo. App. 538; *Scottish U. & N. Ins. Co. v. Clancy*, 71 Tex. 5.

for in the policy only after proofs of loss have been served and received, although the policy contains a provision that none of its conditions shall be waived except by the written endorsement of the president or secretary, and although the submission to arbitration provides that "this appointment is without reference to any question or matters of difference within the terms and conditions of the insurance and is not to be taken as any waiver upon the part of said companies of the said conditions in their policies in case they elect to avail themselves of them."¹⁸¹

This is upon the theory that such a stipulation did not clearly evidence the mutual intent of the parties that there should be no waiver of the right of the insurer to require notice and proofs according to the conditions of the policy. But there is no reason why the parties have not the right to stipulate that any step taken by them shall be no waiver of any rights of either, and they have the right to enter into a written stipulation for arbitration with an express reservation of all the rights of both parties including the right to require notice and proofs of loss; and under such a stipulation, the insured will not be relieved from performing the duties imposed upon him by the policy.¹⁸²

Adjustment.

The payment by an insurer of part of a claim asserted against it for loss covered by the policy of insurance is a

¹⁸¹ Carroll v. Girard Fire Ins. Co., 72 Cal. 297; Bishop v. Agricultural Ins. Co., 130 N. Y. 488; Gale v. State Ins. Co., 33 Mo. App. 664.

¹⁸² Oshkosh Match Works v. Manchester Fire Assur. Co., 92 Wis. 510, 66 N. W. 525; Williams v. Queen's Ins. Co., 39 Fed. 167; Phenix Ins. Co. v. Searles, 100 Ga. 97, 27 S. E. 779; Knudson v. Hekla Fire Ins. Co., 75 Wis. 198, 43 N. W. 954; Wicking v. Citizens' Mut. Fire Ins. Co., 118 Mich. 640, 77 N. W. 275; Scottish U. & N. Ins. Co. v. Clancy, 71 Tex. 5; Lane v. St. Paul F. & M. Ins. Co., 50 Minn. 227; Briggs v. Fireman's Fund Ins. Co., 65 Mich. 52, 31 N. W. 616.

waiver of both notice and proofs;¹⁸³ and the payment of a part of the amount claimed into court;¹⁸⁴ and a completed adjustment of the loss.¹⁸⁵ But a partial adjustment of a loss and an offer of settlement by the insurer and its acceptance of an inventory of the property destroyed is not a waiver of proofs if the insured is at the same time notified that proofs will be expected and required, where the policy provides that there shall be an appraisal on demand of either party, and that such appraisal shall be a part of the proofs of loss, and that losses shall not be payable until such proofs are furnished.¹⁸⁶

FURNISHING OR REFUSING TO FURNISH BLANKS.

§ 205. An insurer need not furnish blanks for either notice or proofs unless it is either expressly or impliedly required to do so by the policy.

The furnishing of blanks for proofs before notice has been given may operate as a waiver of notice.

The failure of an insurer to furnish blanks when it is its duty so to do, estops it from asserting the failure of the insured to furnish notice or proofs on other blanks.

Demand for blanks can usually be made upon either the subordinate or supreme council of a mutual benefit society.

The insurer is under no obligation to notify the insured that either notice or proofs are required and need not furnish blanks upon which to make the same until they are demanded by the insured.¹⁸⁷ An accident insurance company waives

¹⁸³ *Westlake v. St. Lawrence County Mut. Ins. Co.*, 14 Barb. (N. Y.) 206.

¹⁸⁴ *Johnston v. Columbian Ins. Co.*, 7 Johns. (N. Y.) 315.

¹⁸⁵ *Brock v. Des Moines Ins. Co.*, 106 Iowa, 30, 75 N. W. 683; *Fisher v. Crescent Ins. Co.*, 33 Fed. 544.

The right to demand the certificate of a notary, or claim any benefit because of failure to furnish it, is waived by making an adjustment of the loss. *Levy v. Peabody Ins. Co.*, 10 W. Va. 560.

¹⁸⁶ *Scottish U. & N. Ins. Co. v. Clancy*, 71 Tex. 5.

¹⁸⁷ *Continental Ins. Co. v. Dorman*, 125 Ind. 189.

the provisions of a policy requiring notice of accident by furnishing to the insured blanks on which to make proofs of disability without objecting to his failure to give the notice stipulated for.¹⁸⁸ But a waiver of notice or proofs always implies a knowledge on the part of the insurer of the occurrence and date of the event or peril or loss insured against.

It is a general rule that if after knowledge of the occurrence of a loss, the insurer, with knowledge that the insured has failed to give either notice or proofs within the time fixed by the policy, after the expiration of such time furnishes to the insured blanks upon which to make proofs or notice, or does any act from which it can reasonably be inferred that it desires either notice or proofs, and the insured thereafter and within a reasonable time fills up and returns such blanks or accedes to the requirement of the company, the latter will be held estopped to assert the original forfeiture.¹⁸⁹ Otherwise if the insurer acted without knowledge of the true facts in the case, for then the essential element of intent would be lacking. Thus where an accident insurance policy required that the company should be notified of an injury within ten days after it had been received and that failure to give such notice should bar all claims under the policy, no suit can be maintained if notice be not given until twenty-six days after the accident, notwithstanding the fact that thereafter and before it knew of the date of the accident, the insurer furnished blank proofs of loss to the insured at his request and demanded from him further information as to the nature and circumstances of the injury.¹⁹⁰ And the failure of an insured to comply with the requirements of a policy regarding notice of the sickness of a horse is not waived by the insurer furnishing blanks to the

¹⁸⁸ *Crenshaw v. Pacific Mut. Life Ins. Co.*, 71 Mo. App. 42; *Peabody v. Fraternal Acc. Ass'n*, 89 Me. 96.

¹⁸⁹ See ante, notes 66-76.

¹⁹⁰ *Heywood v. Maine Mut. Acc. Ass'n*, 85 Me. 289.

insured where it had at the time no knowledge of the facts and circumstances surrounding the death of the horse.¹⁹¹

It has been asserted that the furnishing of notice and proofs is waived by the failure of the insurer to furnish blanks therefor to the insured upon his demand. The cases supporting this rule almost without exception deal with the rights of parties under policies requiring notice or proofs to be on blanks furnished by the insurer or on forms prescribed by it. There is no obligation of the insurer to the insured except it be imposed by the terms of the contract or by statute or by the conduct of the insurer itself.¹⁹² Such obligation, and none other, must the insurer discharge. There is no doubt but that when the proofs are made upon blanks to be furnished by the insurer, its failure to furnish blanks upon demand relieves the insured from the necessity of supplying proofs.¹⁹³ So where the duty is imposed by statute.^{193a} And when an insurer's by-laws provide "that proof of death shall be made on blanks furnished by the society, with the seal of the lodge to which the member belongs, or of the nearest lodge to the deceased," and blanks are not furnished upon proper application, proof of death may be made without such blanks, and in such case the proofs need not bear the seal of any lodge.¹⁹⁴

In a New York case, where it appeared by the evidence of defendant's officers, that the company was provided with blanks for proofs and that it was the custom upon the death of an insured to send blanks to his representatives or to the local agent, that notice of death was given and afterwards applica-

¹⁹¹ *Alston v. Northwestern Live Stock Ins. Co.*, 7 Kan. App. 179, 53 Pac. 784.

¹⁹² *Continental Ins. Co. v. Dorman*, 125 Ind. 189.

¹⁹³ *Covenant Mut. Ben. Ass'n v. Spies*, 114 Ill. 463; *Dial v. Valley Mut. Life Ass'n*, 29 S. C. 561; *Pray v. Life Indemnity & Security Co.*, 104 Iowa, 114, 73 N. W. 485.

^{193a} *Meyer v. Insurance Co. of North America*, 73 Mo. App. 166.

¹⁹⁴ *Gellatly v. Minnesota Odd Fellows' Mut. Ben. Soc.*, 27 Minn. 215.

tion was made to the insurer for blank proofs which were refused, it was held that "the proofs of death called for by the terms of the policy must, in view of the custom of the defendant, * * * be held to relate to proofs according to its instructions and upon blanks to be by it furnished."¹⁹⁵ An insurer's refusal to furnish blanks upon the ground that it is not liable under the policy operates as a waiver of proofs.¹⁹⁶

Mutual Benefit Societies.

It would seem that in the absence of any stipulation to the contrary, a demand for blanks can properly be made upon either the subordinate or supreme council of a mutual insurance association. The failure of the subordinate council or any agent of the order to properly discharge its duty in any detail connected with the making or furnishing of notices or proofs or blanks for the same, cannot prejudice the claimant.¹⁹⁷ And if a supreme lodge of an association declines to recognize a demand upon it for blanks upon the ground that the matter should properly be taken up with a subordinate lodge, it thereby casts the burden of supplying the proofs upon the subordinate lodge and cannot take advantage of the failure of the latter to act.¹⁹⁸

¹⁹⁵ *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281; *Hoffman v. Manufacturers' Acc. Ind. Co.*, 56 Mo. App. 301.

¹⁹⁶ *Evarts v. United States Mut. Acc. Ass'n*, 16 N. Y. Supp. 27; *American Acc. Ins. Co. v. Norment*, 91 Tenn. 1; ante, "Denial."

¹⁹⁷ *Order of Chosen Friends v. Austerlitz*, 75 Ill. App. 74; *Young v. Grand Council, A. O. A.*, 63 Minn. 506; *Supreme Council, C. B. L., v. Boyle*, 10 Ind. App. 301.

¹⁹⁸ *Supreme Lodge v. Goldberger*, 72 Ill. App. 320.

CHAPTER XV.

ARBITRATION AND AWARD.

- § 206. Validity of Stipulations for Arbitration.
- 207-210. The Effect of such Stipulations.
 - 211. When Stipulations for Arbitration Become Operative.
 - 212. Submission.
 - 213. Selection of Arbitrators and Umpire.
 - 214. Conducting Appraisal.
 - 215. Failure of Arbitrators to Agree.
 - 216. Who Bound by Award.
 - 217. Validity and Effect of Award.
 - 218. Setting Aside Award.
- 219-220. Effect of Demanding or Participating in an Award.
- 221-222. Waiver of Right to Arbitration.
- 223. — Denying Liability in Pleading.

VALIDITY OF STIPULATIONS FOR ARBITRATION.

§ 206. A provision in an insurance policy requiring an arbitration and award on the general question of the liability of the insurer is invalid because it is an attempt to oust the courts of their proper jurisdiction.

A provision for a fair and impartial arbitration and award on special matters such as the amount of damage in case of fire or loss is valid and binding.

Provisions in the constitution and by-laws of mutual benefit societies requiring all questions concerning the liability of the society to its members to be decided and determined by the tribunals of the order are sustained in some jurisdictions.

Very many fire insurance policies contain provisions to the effect that if in case of damage or loss to the property insured, the insurer and insured are unable to agree as to the amount of damage or loss, the same shall either absolutely or conditionally be referred to three disinterested persons selected,

one by the insurer, one by the insured and the other by the two so chosen, and that the award of these three or any two of them shall be conclusive as to the amount of loss or damage. Such stipulations are, in the absence of statutory provisions to the contrary, reasonable and valid; but so far they constitute only an agreement to refer. This is merely a collateral and independent agreement, a breach of which, while it will support a separate action, does not constitute a bar to an action on the policy. When, however, the contract makes the submission to arbitration a condition precedent to the right of the insured to bring a suit, a different question is presented. It has been argued with much force and ingenuity that such stipulations are void, as an attempt to oust the courts of their proper jurisdiction and powers. But the great weight of judicial authority supports the validity of such provisions; and this upon the ground that they do not oust the jurisdiction of the courts, but leave the general question of liability to be judicially determined, and simply provide a plain and reasonable method of estimating and ascertaining the amount of loss.¹

¹ *Hamilton v. Liverpool & L. & G. Ins. Co.*, 136 U. S. 242, 10 Sup. Ct. 945; *Reed v. Washington F. & M. Ins. Co.*, 138 Mass. 572; *Kahnweiler v. Phoenix Ins. Co.*, 57 Fed. 562; *Adams v. South British & Nat. F. & M. Ins. Co.*, 70 Cal. 198; *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13; *Gasser v. Sun Fire Office*, 42 Minn. 315; *Mosness v. German American Ins. Co.*, 50 Minn. 341; *Lesure Lumber Co. v. Mutual Fire Ins. Co.*, 101 Iowa, 514, 70 N. W. 761; *Zalesky v. Home Ins. Co.*, 102 Iowa, 613, 71 N. W. 566; *Van Poucke v. Netherland St. V. de P. Soc.*, 63 Mich. 378, 29 N. W. 863; *Russell v. North American Ben. Ass'n*, 116 Mich. 699, 75 N. W. 137; *Campbell v. American Popular Life Ins. Co.*, 2 Bigelow, Life & Acc. Cas. 16; *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116; *Raymond v. Farmers' Mut. Fire Ins. Co.*, 114 Mich. 386, 72 N. W. 254; *Canfield v. Greater Camp, K. of M.*, 87 Mich. 626, 13 L. R. A. 625; *Hutchinson v. Liverpool & L. & G. Ins. Co.*, 153 Mass. 143, 10 L. R. A. 558; *Kinney v. Baltimore & Ohio Employes' Ass'n*, 35 W. Va. 385, 15 L. R. A. 142. In Pennsylvania, provisions

An agreement that a right of action should not be enforced through the ordinary judicial tribunals cannot be sustained, and therefore a general covenant in a policy that all claims for damages shall be settled by arbitration would not be a bar to a suit for damages. While parties may impose as a condition precedent to application to the courts that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law. A provision in a contract to refer any specific matter of difference which might arise under it, is no defense if it is merely collateral to the principal obligation. These provisions are entirely distinct from covenants providing for the adjustment of certain differences, or the estimate and determination of amounts or values, as preliminary to the right of recovery. In such case, the parties, by the same agreement which creates the liability and gives the right, qualify it by providing that before a right of action shall accrue, certain facts shall be determined or amounts and values be ascertained, and thus create valid conditions precedent either in terms or by necessary implication. Mr. Leake states the results of the English cases as follows: "A reference to arbitration of differences arising upon a contract * * * may be agreed upon in the contract as a condition precedent to the existence of any claim or liability;" and the American courts uphold this doctrine.²

are held to be merely executory and not enforceable, though valid if executed. *Mutual Fire Ins. Co. v. Rupp*, 29 Pa. St. 528; *Penn Plate Glass Co. v. Spring Garden Ins. Co.*, 189 Pa. St. 255.

² Leake, *Contracts*, 953-955; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 266; *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116; *Stephenson v. Piscataqua F. & M. Ins. Co.*, 54 Me. 55; *Prader v. National Masonic Acc. Ass'n*, 95 Iowa, 149, 63 N. W. 601; *Randall v. American Fire Ins. Co.*, 10 Mont. 340, 24 Am. St. Rep. 50; *Niagara Fire Ins. Co. v. Bishop*, 154 Ill. 9, 45 Am. St.

Mutual Societies.

There has been much dispute over the right of mutual organizations to provide in their constitution and by-laws for arbitration tribunals which should decide all questions in dispute between the members and the societies. In *Van Poucke v. Netherland St. Vincent De Paul Soc.*,³ the by-laws in question provided for the appointment of a committee of six members called the "sick committee," whose duty it should be to investigate and determine whether a member was entitled to the benefits on account of sickness, and that the decision of this committee should be final and conclusive. The court said: "This was a mutual benefit co-operative insurance society. The members stood upon an equal footing and this by-law operates upon all alike. It is reasonable that the sick committee should be invested with authority to determine whether a member claiming to be sick is entitled to the benefit provided for in the by-law, and also when such benefit should cease. In a society comprising a numerous membership, deriving its revenues from small monthly contributions, it is of the utmost importance that its business should be carried on inexpensively and with a proper regard to the object sought to be accomplished. It is necessary that there should be some mode of determining the question of when relief should be given and denied, and the method provided in the by-law seems well adapted to the circumstances and needs of such a society. There is nothing oppressive in the terms of the by-law and it contains nothing which the policy of the law forbids. If it is enforced in good faith and with impartiality, which the members pledge themselves to do, it must result in benefit to sick members and at the same time protect the

Rep. 105; Supreme Council, O. C. F., v. Forsinger, 125 Ind. 52, 9 L. R. A. 502; *Hutchinson v. Liverpool & L. & G. Ins. Co.*, 153 Mass. 143, 10 L. R. A. 558.

³ 63 Mich. 378, 29 N. W. 863.

funds of the society from depletion by the undeserving." And in a later case the same court held a similar by-law valid, saying: "This is not a case of an attempted exclusion of remedy by the legislature; but a case where the parties have agreed that only on certain terms and under certain conditions shall a member be entitled to receive any benefits, or the beneficiary named be entitled to receive any sum in case of the death of the member."⁴

But the supreme court of Utah in passing upon a similar stipulation said the agreements between the society and the members are "valid and binding so long as they are not in contravention of the law of the land or of public policy. * * Provisions attempting to create a tribunal having the power to adjudicate upon all the property rights of members or beneficiaries arising by virtue of membership in the order, * * have no more effect than a revocable agreement to submit to an award; because otherwise the attempt would be to usurp the functions of the sovereign power, for it alone can create judicial tribunals."⁵

As to the effect of these provisions, restricting the right of the member or beneficiary to resort primarily to the courts for relief, there are three rules laid down: (1) The Michigan rule, holding such stipulations valid, and that they do not so far contravene public policy as to permit parties who contract with reference to them to seek relief in the courts rather than in the tribunals of the order.⁶ (2) The Indiana rule, which holds that such provisions are valid to the extent that they create a condition precedent with which the claimant must

⁴ *Henbeau v. Great Camp, K. of M.*, 101 Mich. 161, 59 N. W. 417; *Raymond v. Farmers' Mut. Fire Ins. Co.*, 114 Mich. 386, 72 N. W. 255.

⁵ *Daniher v. Grand Lodge, A. O. U. W.*, 10 Utah, 110, 37 Pac. 245.

⁶ See ante, note 4; *Canfield v. Great Camp, K. of M.*, 87 Mich. 626, 13 L. R. A. 625; *Robinson v. Templar Lodge*, 117 Cal. 370, 49 Pac. 170; *Supreme Lodge, O. S. F., v. Dey*, 58 Kan. 283, 49 Pac. 74.

comply, but that the decision of the tribunal provided for in the contract is not binding or conclusive, and that the claimant after exhausting the remedies provided for in his contract may thereafter invoke the aid of the courts.⁷ (3) The Utah rule, which holds such provisions are absolutely void, and that the claimant may absolutely disregard them and proceed directly to ask relief in the courts.⁸

EFFECT OF SUCH STIPULATIONS.

§ 207. Whether or not a submission to arbitration or a reference is a condition precedent to the maturing of a right to bring suit depends upon the wording of the policy.

§ 208. A mere agreement to refer or to ascertain the amount of a loss by arbitration does not create a condition precedent.

§ 209. Where arbitration is made a condition precedent to a right of action, the insured must do all in his power to bring about an arbitration according to the provisions of the policy; otherwise he cannot recover in the absence of a waiver of the condition by the insurer.

§ 210. Arbitration is unnecessary in case of total loss under a valued policy.

Reference must be had to the whole of the conditions of the policy in order to determine whether or not the agreement to refer is an independent and collateral agreement, or whether it is an essential part of the contract to pay the loss and a condition precedent to plaintiff's right of action. Stipulations for arbitration or agreements to ascertain the amount of damage or loss by arbitration will not deprive the insured of his right of action on the policy or postpone such right until after a submission and award, unless they are clearly made conditions precedent to the existence of such right. The

⁷ Supreme Council, O. C. F., v. Forsinger, 125 Ind. 52, 9 L. R. A. 501.

⁸ Daniher v. Grand Lodge, A. O. U. W., 10 Utah, 110, 37 Pac. 245; Whitney v. National Masonic Acc. Ass'n, 57 Minn. 472; Bacon, Ben. Soc. §§ 123, 450; Crossley v. Connecticut Fire Ins. Co., 27 Fed. 30.

meaning and intent of the parties must be ascertained from the language they have used; and if the meaning of the parties is that the sum to be recovered should be only such sum as, if not agreed upon in the first instance, should be decided by arbitration, and that the sum so ascertained and no other shall be recovered, the circumstances that the parties have not stated that meaning in the most artistic form is unimportant.⁹

There are two cases in which a submission is made a condition precedent to a right of action: (1) where the action can only be brought for the sum fixed by the arbitrators, (2) where arbitration is made a condition precedent by the express terms of the contract or by necessary inference therefrom. In all other cases where there is first a covenant to pay, and secondly a covenant to refer, the covenants are distinct and collateral and the plaintiff may bring suit on the first, leaving the defendant to bring an action for not referring.¹⁰

But the courts must interpret and give effect to contracts according to the clear intent of the parties as expressed therein, and where it is manifestly the intention of the parties that until an award shall have been obtained a loss shall not be payable, an insured must comply with the terms of the contract and perform all the conditions by him to be performed, or show legal excuse for his failure so to do or a waiver of non-compliance by the insurer. Where the parties

⁹ *Chapman v. Rockford Ins. Co.*, 89 Wis. 572, 62 N. W. 422; *Gasser v. Sun Fire Office*, 42 Minn. 315; *Lesure Lumber Co. v. Mutual Fire Ins. Co.*, 101 Iowa, 514, 70 N. W. 761; *Canfield v. Watertown Fire Ins. Co.*, 55 Wis. 419; *Lamson C. Store-Service Co. v. Prudential Fire Ins. Co.*, 171 Mass. 433, 50 N. E. 943; *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329, 9 Am. St. Rep. 598; *Hamilton v. Home Ins. Co.*, 137 U. S. 370; *Case v. Manufacturers' F. & M. Ins. Co.*, 82 Cal. 263; *Supreme Lodge, O. S. F., v. Dey*, 58 Kan. 293, 49 Pac. 74; *Mutual Fire Ins. Co. v. Alvord (C. C. A.)*, 61 Fed. 752.

¹⁰ *Hamilton v. Home Ins. Co.*, 137 U. S. 383; *Hamilton v. Liverpool*,

in their contract fix upon a certain mode by which the amount to be paid shall be ascertained, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed unless he shall procure the kind of evidence required by the contract or show that by time or accident he is unable to do so.¹¹

Stipulations Creating a Condition Precedent — Illustrations.

A provision "that no suit or action shall be sustainable until after an award shall have been obtained fixing the amount of such claim as herein provided" makes the obtaining of an award a condition precedent.¹² Likewise a provision for arbitration and award in case of dispute as to the amount of the loss with the further provision that the amount of loss shall not be payable "until after notice, etc., including an award by the appraisers when an appraisal has been required." Under such policy, an appraisal is "required" when insurer and insured disagree about the amount of the loss.¹³

L. & G. Ins. Co., 136 U. S. 255; *Read v. State Ins. Co.*, 103 Iowa, 307, 72 N. W. 667.

¹¹ *Hamilton v. Liverpool*, L. & G. Ins. Co., 136 U. S. 255; *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116.

¹² *Hamilton v. Liverpool*, L. & G. Ins. Co., 136 U. S. 255; *Gasser v. Sun Fire Office*, 42 Minn. 315; *Chapman v. Rockford Ins. Co.*, 89 Wis. 572, 62 N. W. 422; *George Dee & Sons Co. v. Key City Fire Ins. Co.*, 104 Iowa, 167, 73 N. W. 594.

¹³ *Mosness v. German-American Ins. Co.*, 50 Minn. 341. In this case it was held that a complaint which showed a disagreement as to the amount of damage did not state a cause of action by alleging generally that plaintiff had complied with all the terms and conditions of the policy, and without alleging any facts relieving plaintiff from a submission, or excusing him from being bound by the provisions of the policy in that particular.

In *McNees v. Southern Ins. Co.*, 69 Mo. App. 233, the same doctrine was announced; and the court held, further, that either insurer or assured had the right to act in the matter of obtaining an appraisal, and that, if the insurer fails to demand an arbitration, he can-

And a stipulation in a life insurance policy that the company would pay the face of the policy only "if in the opinion of the surgeon-in-chief of this company the insured did not die of intemperance," and requiring the production of the decision of the surgeon as to the cause of death, is valid; and the party seeking to recover must show the decision of the surgeon that death did not result from the excepted cause, or show sufficient excuse for its non-production.¹⁴

So a condition precedent is created by a provision that in case of difference of opinion as to the amount of compensation payable under a policy, the question should be referred to the arbitration of a person to be named by the secretary for the time being of the Master of the Rolls, and that the award made on such arbitration should be taken as a final settlement of the question and might be made a rule of court;¹⁵ and by a provision that in case of disagreement the amount of damage should be ascertained by appraisers, and when so ascertained and proofs of loss made, the same shall be payable sixty days after receipt of such proof, where proof of loss must contain the appraisal.¹⁶ And by a provision that, in case of difference of opinion as to amount of loss or damage, such difference shall be submitted to the judgment of two disinterested and competent men mutually chosen (who in case

not complain of the delay of the insured in making demand therefor, unless the delay be so great as to make an arbitration impossible or so impracticable as to defeat its object. See, also, *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 297; *Kahnweiler v. Phoenix Ins. Co.*, 57 Fed. 562; *American Fire Ins. Co. v. Stuart* (Tex. Civ. App.), 38 S. W. 395; *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291, 79 N. W. 1005.

¹⁴ *Campbell v. American Popular Life Ins. Co.*, 2 Bigelow, Life & Acc. Cas. 16, 1 MacArthur, D. C. 471; *Raymond v. Farmers' Mut. Ins. Co.*, 114 Mich. 386, 72 N. W. 255.

¹⁵ *Braunstein v. Accidental Death Ins. Co.*, 1 Best & S. 783.

¹⁶ *Langan v. Aetna Ins. Co.*, 96 Fed. 705.

of disagreement should select a third), whose award should be conclusive on the parties.¹⁷

And it has been held that the tribunals of a mutual benefit society to which the claimants are required by their contract to submit their claims must be applied to before legal redress is sought, even though the provisions making the decision of such tribunals conclusive are contrary to public policy and therefore void.¹⁸ Where the policy makes an arbitration a condition precedent only when demanded, the condition does not become operative until a demand is made.¹⁹

When First Award is Set Aside.

If an award is set aside for any cause not contributed to or participated in by either party, the agreements of the policy respecting arbitration still remain in force, and a new appraisal, unless it has become impossible or has been waived, must be had if an award be a condition precedent to a right of action.²⁰

Stipulations Not Making an Award a Condition Precedent to the Right to Sue.

A stipulation in a policy of insurance providing that in case of difference of opinion as to the amount of the loss or damage there should be a reference of the same to arbitration, does not bar the assured of his right to an action without such reference, unless the stipulation clearly shows that it is a

¹⁷ *Old Saucelito L. & D. Dock Co. v. Commercial Union Assur. Co.*, 66 Cal. 253; *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 297; *Gauche v. London & L. Ins. Co.*, 4 Woods (U. S.), 102, 10 Fed. 347.

¹⁸ See ante, note 6.

²⁰ *Read v. State Ins. Co.*, 103 Iowa, 307, 72 N. W. 667; *Levine v. Lancashire Ins. Co.*, 66 Minn. 149; *Carroll v. Girard Fire Ins. Co.*, 72

¹⁹ *Zalesky v. Home Ins. Co.*, 102 Iowa, 613, 71 N. W. 566. See post, "Demand for Appraisal."

Cal. 297. As to procedure when an umpire is not selected, see post, "Failure to Agree."

condition precedent to his right to resort to the courts, or clearly makes such submission the only mode by which the amount of damage is to be ascertained or by which the liability of the insurer can be fixed. Either of these two latter provisions would at least be equivalent to making a condition precedent to be performed before suit. Even then the action of the insurer may be such as to amount to a waiver of the stipulation or to estop it from setting the stipulation up as a defense.²¹ The refusal of the insured to submit to an award does not bar his right to suit under a clause providing only "that in case differences shall arise touching any loss or damage * * * the matter shall at the written request of either party be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy."²²

A stipulation providing for arbitration will not be held to create a condition precedent to a right of action by the insured unless it be definite and certain as to the time and manner of the submission, the number of arbitrators, the mode of their selection and their duties, powers and rights.²³ Thus a policy which in terms requires a submission and appraisal, in case of the failure of the parties to agree, by disinterested appraisers mutually agreed upon, and providing that the return of the award by the arbitrators so chosen should be a

²¹ *Liverpool, L. & G. Ins. Co. v. Creighton*, 51 Ga. 95.

²² *Hamilton v. Home Ins. Co.*, 137 U. S. 370, 11 Sup. Ct. 133. For a like holding under similar provisions, see *Gere v. Council Bluffs Ins. Co.*, 67 Iowa, 272, 23 N. W. 137; *Scott v. Phoenix Assur. Co.*, 1 Bennett, Fire Ins. Cas. 118; *Canfield v. Watertown Fire Ins. Co.*, 55 Wis. 419, 13 N. W. 252; *Case v. Manufacturers' F. & M. Ins. Co.*, 82 Cal. 263; *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329; *Reed v. Washington F. & M. Ins. Co.*, 138 Mass. 576; *Seward v. City of Rochester*, 109 N. Y. 167; *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116.

²³ *Greiss v. State Inv. & Ins. Co.*, 98 Cal. 241, 33 Pac. 195.

prerequisite to any right of action on the policy, are so indefinite and uncertain both as to the number of arbitrators and the mode of their selection, that they are inoperative where no arbitrators are agreed upon.²⁴ A beneficiary in a certificate issued by a mutual benefit society may maintain an action in the courts on his certificate after an adverse decision by an officer of the order to whom he was required first to present his claim without appealing to other tribunals of the order, although the certificate permits such an appeal.²⁵ Nor is a condition precedent created by a stipulation that payment should be made within sixty days after proofs were furnished, and "in case any difference of opinion shall arise as to the amount of loss under this policy it is mutually agreed that the said loss shall be referred to three disinterested men, * * * and the decision of a majority of such referees in writing shall be final and binding on the parties."²⁶

A provision that if differences arise as to the amount of loss or damage they shall be submitted to arbitration, and that no action shall be brought until after an award shall be obtained if either party make a written request for arbitration, does not preclude a bringing of suit unless the insurer has made a written request for arbitration. The right to demand an arbitration being optional with either party and neither having availed himself of the right, it will be deemed waived by both and the insured left to his usual legal redress.²⁷ This is also the construction given to the Michigan

²⁴ *Aetna Ins. Co. v. McLead*, 57 Kan. 95, 45 Pac. 73, 25 Ins. Law J. 669; *Case v. Manufacturers' F. & M. Ins. Co.*, 82 Cal. 263; *Mark v. National Fire Ins. Co.*, 24 Hun, 565, 91 N. Y. 663; *Williams v. Hartford Ins. Co.*, 54 Cal. 442.

²⁵ *Supreme Lodge, O. S. F., v. Dey*, 58 Kan. 283, 49 Pac. 74; *Bauer v. Samson Lodge, K. of P.*, 102 Ind. 262.

²⁶ *Crossley v. Connecticut Fire Ins. Co.*, 27 Fed. 30.

²⁷ *Capitol Ins. Co. v. Wallace*, 48 Kan. 400, 29 Pac. 755; *Germania Fire Ins. Co. v. Frazier*, 22 Ill. App. 327; *German-American Ins. Co.*

standard policy which provides that in case of disagreement the amount of loss shall be ascertained by appraisers, that the loss shall not be payable until satisfactory proofs have been received including an award by the appraisers when an appraisal has been required, and that no action on the policy shall be maintained until compliance by the assured with all such requirements.²⁸ A provision that the rights and obligations of the parties to the policy shall be determined by the arbitrators, and that no action shall be maintained upon the contract without arbitration, does not bar an action without a reference, where the contract clearly fixes a certain and definite amount to be paid by the insurer.²⁹

Total Loss.

In the absence of any provisions to the contrary, the stipulations of an open policy requiring the appointment of appraisers to determine the amount of loss or damage and making an award a condition precedent to bringing suit, apply to all losses, total as well as partial.³⁰ But under the provisions of a valued policy, whether so drawn with or without statutory compulsion, the actual value of the property destroyed and the actual damage to the insured in case of total destruction of the property insured are wholly immaterial; because the amount of insurance written in the policy fixes conclusively the amount of the loss and the absolute measure of recovery. The submission to arbitration in such a case does not operate to limit the recovery on the policy to the

v. Steiger, 109 Ill. 254; Nurney v. Fireman's Fund Ins. Co., 63 Mich. 633, 30 N. W. 350.

²⁸ Brock v. Dwelling House Ins. Co., 102 Mich. 583, 61 N. W. 67; Lesure Lumber Co. v. Mutual Fire Ins. Co., 101 Iowa, 514, 70 N. W. 761.

²⁹ Whitney v. National Masonic Acc. Ass'n, 52 Minn. 378.

³⁰ Gasser v. Sun Fire Office, 42 Minn. 315; Chippewa Lumber Co. v.

amount awarded by the arbitrators.³¹ An agreement for arbitration as to the amount of loss has no effect when the policy containing it was issued after the enactment of a law making the amount stated in the policy conclusive as to the amount of liability of the insurer in case of total loss.³² In Missouri, in case of total loss of the property insured, the statute makes the insurer liable for the face of the policy less any depreciation of value after the issuance of the policy, and appraisers can determine only the amount of depreciation.³³ A provision for arbitration in a policy covering both house and personal property is not applicable when the house is totally destroyed where the statute of the forum makes the claim for insurance on the house a liquidated demand.³⁴ Loss arising from a total destruction of property insured is not included within a provision in a policy providing for arbitration only in case the property is "damaged by fire."³⁵ But arbitration is sometimes necessary even in case of total loss under

Phenix Ins. Co., 80 Mich. 116, 44 N. W. 1055. See, also, Rosenwald v. Phenix Ins. Co., 50 Hun (N. Y.), 172.

³¹ Oshkosh Gas Light Co. v. Germania Fire Ins. Co., 71 Wis. 454, 37 N. W. 819; Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 9 L. R. A. 45; German Fire Ins. Co. v. Eddy, 26 Neb. 461, 54 N. W. 856, 19 L. R. A. 707; Seyk v. Millers' Nat. Ins. Co., 74 Wis. 67, 41 N. W. 443, 3 L. R. A. 523.

³² Ampleman v. Citizens' Ins. Co., 35 Mo. App. 308; Thompson v. St. Louis Ins. Co., 43 Wis. 459. As to what destruction of property amounts to a total loss, see O'Keefe v. Liverpool & L. & G. Ins. Co., 140 Mo. 558, 39 L. R. A. 819, 45 Cent. Law J. 373; Trustees of St. Clara Female Academy v. Northwestern Nat. Ins. Co., 98 Wis. 257, 73 N. W. 767; Royal Ins. Co. v. McIntyre, 90 Tex. 170, 35 L. R. A. 676; Corbett v. Spring Garden Ins. Co., 155 N. Y. 389, 41 L. R. A. 318; Insurance Co. of North America v. Canada Sugar-Refining Co. (C. C. A.), 87 Fed. 491; and ante, note 31.

³³ Baker v. Phenix Assur. Co., 57 Mo. App. 559.

³⁴ Phenix Ins. Co. v. Moore (Tex. Civ. App.), 46 S. W. 1131.

³⁵ Liverpool, L. & G. Ins. Co. v. Colgin (Tex. Civ. App.), 34 S. W. 291.

a valued policy where the provisions of the policy with reference to arbitration cover a case where there is a dispute as to whether or not the loss or destruction was total and leaving that question to be determined by arbitration.³⁶

WHEN STIPULATIONS FOR ARBITRATION BECOME OPERATIVE.

§ 211. The stipulations of a policy may be absolute and self-executing, or conditional and dependent upon the right to take advantage of them being claimed by either insurer or insured.

Stipulations requiring a reference or appraisal absolutely as a condition precedent to any right of action by the insured are self executing, and become operative upon the happening of the event or loss insured against.³⁷ The parties may waive the absence of a disagreement or other exigency which makes a reference necessary; and they may voluntarily enter into a submission which will form a basis of a valid award. Each party must discharge the duty required of him before he can take advantage of a provision imposing a duty upon the other. Where arbitration and award are only necessary in case the parties differ or disagree as to the amount of the loss, a difference or disagreement must occur before a submission can properly be demanded. If the right to an arbitration and award is given conditionally, as "when demanded," a demand must be made by the one seeking the benefit of the right. Such demand must be made according to the requirement of the policy and without unnecessary delay.

Appraisal Without Disagreement.

Though neither insurer nor insured can ordinarily take advantage of the arbitration clause in a policy until there has been an honest and unsuccessful effort to agree on the amount of damage, there does not seem to be any good reason why they

³⁶ *Yendel v. Western Assur. Co.*, 21 Misc. Rep. (N. Y.) 349.

³⁷ See preceding section.

may not immediately after the happening of a loss waive any or all of the requirements of the policy respecting demand for submission and the form thereof, and forthwith enter into any agreement they choose looking towards a certain and immediate determination of the extent of the loss or damage. And after an insurer has joined in a submission to appraisers, it will not be heard to claim that such submission was premature because made before the parties had attempted to agree.³⁸

An otherwise valid award is binding upon the insured as well as upon the insurer although a submission to appraisers was not a condition precedent to the commencement of an action because neither party made a written demand therefor.³⁹ An appraisal of the value of property made by builders selected by the insured and the adjuster of the company is an appraisal within the policy, and binding upon both both parties, notwithstanding there was no conference between them as to the amount of the loss and no effort made to agree thereon.⁴⁰

What Constitutes a Difference or Disagreement.

The provisions of policies concerning the appointment of appraisers in case of failure of the parties to agree as to the amount of loss or damage are *per se* inoperative, unless there is a real difference between the parties as to the amount of the loss and a failure to agree thereon. There is no occasion for an appraisal until the insurer and insured have met

³⁸ Bangor Sav. Bank v. Niagara Fire Ins. Co., 85 Me. 68, 20 L. R. A. 650; London & L. Fire Ins. Co. v. Storrs (C. C. A.), 71 Fed. 120; Brock v. Dwelling House Ins. Co., 102 Mich. 583; Broadway Ins. Co. v. Doying, 55 N. J. Law, 569.

³⁹ Harrison v. German-American Fire Ins. Co., 67 Fed. 577; Springfield F. & M. Ins. Co. v. Payne, 57 Kan. 291, 46 Pac. 315, 26 Ins. Law J. 46.

⁴⁰ London & L. Fire Ins. Co. v. Storrs (C. C. A.), 71 Fed. 120.

and made an honest, reasonable, and ineffectual attempt to agree upon and settle the extent of the damage between themselves. Until this has been done, or has been waived, or is manifestly useless from the conduct and attitude of the parties, no rights can be gained by demanding, or loss by failing to demand, an appraisal.⁴¹

A mere general objection by the insurer to the amount claimed by the insured in his statement of loss is not such a failure to agree as makes a case for arbitration;⁴² nor the denial of liability by the insurer because of the forfeiture

⁴¹ *Hickerson v. German American Ins. Co.*, 96 Tenn. 193, 32 L. R. A. 172; *American Fire Ins. Co. v. Stuart* (Tex. Civ. App.), 38 S. W. 395; *Vangindertaelen v. Phenix Ins. Co.*, 82 Wis. 112; *Boyle v. Hamburg-Bremen Fire Ins. Co.*, 169 Pa. St. 349; *Moyer v. Sun Ins. Office*, 176 Pa. St. 579, 35 Atl. 221; *Brock v. Dwelling House Ins. Co.*, 102 Mich. 583, 26 L. R. A. 623.

The Minnesota standard policy provides that, "in case of loss * * * and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred," etc. Construing this, the supreme court of Minnesota, in *Fletcher v. German-American Ins. Co.*, 79 Minn. 337, 82 N. W. 648, said: "Giving the policy a broad and liberal construction, we interpret it to mean that, when the parties are unable to agree upon the amount of the loss, the question of such amount shall be submitted to arbitration. Until there is some disagreement as to the amount of the loss, there is no occasion for any arbitration; there is nothing to arbitrate. In this case the proof of loss furnished defendant specified the amount claimed by plaintiff. Defendant made no objection thereto, and, after the lapse of sixty days, plaintiff brought this action. Defendant, having made no objection to the amount claimed by plaintiff, must be taken to have acquiesced therein; at least, it must be held that, inasmuch as no objection was made to the amount claimed, there was nothing to found an arbitration upon, and none was necessary. This construction is in harmony with the objects and purposes of the law and the terms of the policy, and we adopt it as the most reasonable and consistent." And see *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291, 79 N. W. 1005.

⁴² *Hickerson v. German American Ins. Co.*, 96 Tenn. 193, 32 L. R. A. 172; *Fletcher v. German American Ins. Co.*, 79 Minn. 337, 82 N. W. 647.

of the policy.⁴³ But a difference and disagreement arise where the insured refuses to accept an offer made by the insurer in full settlement of the amount of damages.⁴⁴

Who Must Demand the Arbitration.

Where arbitration and award are in case of disagreement conditions precedent to recovery, the insured must, if a disagreement occur, demand an arbitration unless the necessity therefor is waived by the insurer.⁴⁵ Generally speaking, unless by the terms of the policy arbitration is a condition precedent to the right to bring suit, an insurer which neglects to or refuses to take advantage of the provision in the policy looking towards arbitration as to the amount of the loss, cannot complain if the insured brings suit to compel payment without arbitration.⁴⁶ Neither a demand for an appraisal made by a plaintiff after the bringing of a suit, nor his acquiescence after he has brought suit in a demand for an appraisal made by the defendant long before suit was brought, is a sufficient compliance with the conditions of the policy requiring an appraisal "if demanded" prior to the bringing of an action.⁴⁷

In *Mosness v. German-American Ins. Co.*,⁴⁸ the supreme court of Minnesota held that under a policy providing that the

⁴³ *Nelson v. Atlanta Home Ins. Co.*, 120 N. C. 302, 27 S. E. 38.

⁴⁴ *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 106 N. C. 28; *Murphy v. Northern British & Mercantile Co.*, 61 Mo. App. 323.

⁴⁵ *Hutchinson v. Liverpool & L. & G. Ins. Co.*, 153 Mass. 143, 10 L. R. A. 558; *Mosness v. German-American Ins. Co.*, 50 Minn. 347; *Hamilton v. Liverpool & L. & G. Ins. Co.*, 136 U. S. 242, 10 Sup. Ct. 945; *McNees v. Southern Ins. Co.*, 69 Mo. App. 232.

⁴⁶ *Gnau v. Masons' Fraternal Acc. Ass'n*, 109 Mich. 527, 67 N. W. 546; *Germania Fire Ins. Co. v. Frazier*, 22 Ill. App. 327; *Commercial Ins. Co. v. Robinson*, 64 Ill. 265; *Citizens' Ins. Co. v. Bland* (Ky.), 39 S. W. 825. See ante, "Condition Precedent."

⁴⁷ *Zalesky v. Home Ins. Co.*, 102 Iowa, 613, 71 N. W. 566.

⁴⁸ 50 Minn. 341; *McNees v. Southern Ins. Co.*, 69 Mo. App. 232.

loss shall not be payable until sixty days after notice including an award by appraisers "when the appraisal has been required," an appraisal was "required" not upon demand, but whenever the insurer and insured disagreed over the amount of loss. The supreme court of Michigan arrived at a different conclusion in construing the standard policy of that state containing provisions almost identical with the policy involved in the Mosness case.⁴⁹ In Washington it is held that such a condition does not require the assured to demand an appraisal, but that his refusal to submit to an appraisal upon demand of the company therefor will bar his right to recovery.⁵⁰ If an appraisal is only necessary when demanded, a demand must be made before the provision for appraisal becomes operative.⁵¹

When the Demand Must be Made.

The right to demand an appraisal, if an appraisal be necessary only when "required," must be exercised within a reasonable time after the disagreement of the parties. A demand by the insurer fifty-seven days after proofs of loss have been received and retained without objection to the amount of damage claimed, is too late, where, by the terms of the policy, the amount becomes payable sixty days after the proofs of loss have been served. When a policy gives the insurer an option to take the damaged property at its appraised value or replace it within a reasonable time on giving notice

⁴⁹ *National Home B. & L. Ass'n v. Dwelling House Ins. Co.*, 106 Mich. 236, 64 N. W. 21; *Brock v. Dwelling House Ins. Co.*, 102 Mich. 583, 61 N. W. 67; *Lesure Lumber Co. v. Mutual Fire Ins. Co.*, 101 Iowa, 514, 70 N. W. 761; *Grand Rapids Fire Ins. Co. v. Finn*, 60 Ohio St. 513, 54 N. E. 545.

⁵⁰ *Davis v. Atlas Assur. Co.*, 16 Wash. 232, 47 Pac. 436, 885. See, also, *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291, 79 N. W. 1005.

⁵¹ *Zalesky v. Home Ins. Co.*, 102 Iowa, 613, 71 N. W. 566.

within thirty days after proofs of loss are served, the appraisal must be demanded within thirty days.⁵²

An action may be brought at the expiration of sixty days after the presentation of proofs of loss, when there is no dispute as to the amount of damage before that time and the provision is for an arbitration within sixty days after proofs are furnished.⁵³ A demand nearly a year after a loss occurs is too late.⁵⁴ Delay by the insured in the demanding of an arbitration, where one is necessary to his right of action, does not defeat his right afterwards to make an offer of arbitration and maintain his action upon the refusal of the insurer to arbitrate, unless the insurer has been prejudiced by the delay or an arbitration has become impracticable or impossible where the insurer might itself have demanded an arbitration.⁵⁵

The Form of the Demand.

Any notice which fully advises the party notified of the intention of his adversary to insist upon a reference or appraisal according to the terms of the policy is sufficient unless the form and manner of giving notice be designated in the policy; but when the policy specifies the form of giving a demand, and provides for an appraisal upon "the written request of either party," an arbitration is only necessary when requested in writing, and an oral request is insufficient; and an insurer failing to avail itself of this right given by the policy in the manner stipulated therein cannot maintain the defense of no

⁵² *Zimeriski v. Ohio Farmers' Ins. Co.*, 91 Mich. 600, 52 N. W. 55; *Brock v. Dwelling House Ins. Co.*, 102 Mich. 583, 61 N. W. 67; *Nurney v. Fireman's Fund Ins. Co.*, 63 Mich. 633, 30 N. W. 350.

⁵³ *Hayes v. Milford Mut. Fire Ins. Co.*, 170 Mass. 492, 27 Ins. Law J. 459.

⁵⁴ *Davis v. Atlas Assur. Co.*, 16 Wash. 232, 47 Pac. 436, 885.

⁵⁵ *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291, 79 N. W. 1005; *McNees v. Southern Ins. Co.*, 69 Mo. App. 232.

award.⁵⁶ A letter to the assured from the adjuster of the insurer referring to a paper including an agreement for arbitration executed by the company, and requesting the insured to sign it, and a proposal drawn in strict conformity with the provisions of the policy, constitute "a written request" for arbitration within the meaning of that term in a policy.⁵⁷

Where several insurers of the same property desire an appraisal they must make their demands separately.⁵⁸ If two fires follow one another closely, a single demand and appraisal may be sufficient.⁵⁹ Where, by the terms of the policy, upon a disagreement, the insured is to deposit with the insurer money to pay for an appraisement and the insurer is to appoint the appraisers, an appraisal had without notice to the insurer of the appointment of the appraisers and of the time when they are to act, is void.⁶⁰

On Whom the Demand Should be Made.

A demand can be served or made upon either of the parties or a duly authorized agent of either, who is empowered to act in the premises. Thus a demand may be served upon any agent of the insurer who has authority to issue policies and

⁵⁶ *Davis v. Anchor Mut. Fire Ins. Co.*, 96 Iowa, 70, 64 N. W. 687; *Wright v. Susquehanna Mut. Fire Ins. Co.*, 110 Pa. St. 29; *Phoenix Ins. Co. v. Badger*, 53 Wis. 283; *Wallace v. German-American Ins. Co.*, 2 Fed. 658; *Nurney v. Firemans' Fund Ins. Co.*, 63 Mich. 633; *German-American Ins. Co. v. Steiger*, 109 Ill. 254. Compare *Hutchinson v. Liverpool & L. & G. Ins. Co.*, 153 Mass. 143, 10 L. R. A. 558.

⁵⁷ *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 106 N. C. 28; *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116; *Zalesky v. Home Ins. Co.*, 102 Iowa, 613, 71 N. W. 566.

⁵⁸ *Connecticut Fire Ins. Co. v. Hamilton (C. C. A.)*, 59 Fed. 258; *George Dee & Sons Co. v. Key City Fire Ins. Co.*, 104 Iowa, 167, 73 N. W. 595; *Harrison v. German-American Fire Ins. Co.*, 67 Fed. 587. But see *Wicking v. Citizens' Mut. Fire Ins. Co.*, 118 Mich. 640, 77 N. W. 277.

⁵⁹ *Mechanics' Ins. Co. v. Hodge*, 149 Ill. 305, 46 Ill. App. 479.

⁶⁰ *Schreiber v. German-American Hail Ins. Co.*, 43 Minn. 368.

collect premiums for it.⁶¹ But the insurer is not affected by service on one who is not commissioned by it where the policy provides that no person shall be considered as an agent of the company except one holding a commission from it.⁶² And a notice served upon a treasurer, who has at the time practically entire management of the business, and knowledge of the meeting and proceedings of the appraisers, is binding upon the corporation which he represents.⁶³

SUBMISSION.

§ 212. Neither party is under any obligation to make any agreement for submission except the one provided for in the policy.

The parties may waive or modify the stipulations of the policy and can agree upon a different form of submission, which when executed will support a valid award.

An executed submission according to the terms of the contract is irrevocable. A voluntary submission or common-law submission is revocable at least until after the award has been made.

The submission of a disputed matter to arbitrators is usually evidenced by a written agreement describing the matters involved in the arbitration, the names or means of ascertaining the arbitrators, the powers and duties of the arbitrators, and in a general way the methods to be adopted for the conduct of the proceedings and the time and manner of rendering an award. If the submission is involuntary, it must be according to the terms of the policy; but an appraisal of the amount of a loss made by persons appointed informally by the insurer and insured is binding although the proceedings leading up to the appointment and appraisal are not in strict accordance with

⁶¹ Phenix Ins. Co. v. Stocks, 149 Ill. 319.

⁶² Mechanics' Ins. Co. v. Hodge, 46 Ill. App. 479.

⁶³ Remington Paper Co. v. London Assur. Corp., 12 App. Div. 218, 43 N. Y. Supp. 431.

the requirements of the policy, since the parties are at liberty to waive such requirements, and make any lawful submission which is satisfactory to themselves.⁶⁴ The insured has the right to demand that if an appraisal of damages provided for by the policy is made, it shall embrace all property claimed by him to be covered by the policy, even though there be a dispute as to what property is actually insured.⁶⁵ Where the policy contains a provision for the submission of all differences as to the amount of loss, the insured can abandon all claims for insurance on specific articles and demand an arbitration as to the amount of damage on other insured property.⁶⁶

A submission to arbitration and an award pursuant thereto according to the conditions of a policy of insurance are not covered by nor subject to the statutory regulations for arbitration unless specially included therein.⁶⁷ A voluntary submission by a member of a mutual benefit society of his claim for sick benefits to appellate tribunals appointed by the constitution and by-laws of the organization for that purpose, is in the nature of a submission to an arbitration, and a decision pursuant thereto is in the nature of an award and binding upon him in the absence of proof of mistake, fraud or misconduct on the part of the tribunal. In such case there is an implied agreement on the part of the member to be bound by the judgment or award rendered, and it is not necessary that there should be any express agreement to abide by the award made, for the law implies such an agreement from the very fact of submission.⁶⁸

⁶⁴ *London & L. Fire Ins. Co. v. Storrs* (C. C. A.), 71 Fed. 120. See notes 38-42.

⁶⁵ *George Dee & Sons Co. v. Key City Fire Ins. Co.*, 104 Iowa, 167, 73 N. W. 594.

⁶⁶ *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 110 N. C. 176.

⁶⁷ *Enright v. Montauk Fire Ins. Co.*, 15 N. Y. Supp. 893.

⁶⁸ *Robinson v. Templar Lodge*, 97 Cal. 62, 31 Pac. 609.

Revocability.

A compulsory submission to arbitration according to the terms of the policy is irrevocable after it is made, but a voluntary or common-law submission is ordinarily revocable, at least until after the rendition of the award.⁶⁹

Joint Submission.

A submission to arbitration may be made jointly by the insured and several insurance companies where the controversy of each is the same and where the policies are all alike except in the names of the companies and the submission is such as provided for in the policy.⁷⁰ Otherwise where the policies differ and there are separate and distinct controversies.⁷¹

Two Fires, One Loss.

Where a loss results by reason of successive fires happening within a short time of each other, the recovery to be had on a policy by reason of such fires is a single sum, there being but one loss. Where successive fires have occurred within a short space of time and the loss has not been in any manner adjusted, the provisions of the policy requiring differences to be submitted to arbitration do not contemplate a submission of the different items to different arbitrators; the loss to be determined is the loss sustained by the assured under the terms of the policy. Whether this rule would apply where a

⁶⁹ *Citizens' Ins. Co. v. Coit*, 12 Ind. App. 161, 39 N. E. 766; *Commercial Union Assur. Co. v. Hocking*, 115 Pa. St. 407; *Soars v. Home Ins. Co.*, 140 Mass. 343; post, note 133; *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116.

⁷⁰ *Wicking v. Citizens' Mut. Fire Ins. Co.*, 118 Mich. 640, 77 N. W. 275.

⁷¹ *Connecticut Fire Ins. Co. v. Hamilton*, 8 C. C. A. 114, 59 Fed. 262; *Hamilton v. Phenix Ins. Co.*, 9 C. C. A. 530, 61 Fed. 385; *Harrison v. German-American Fire Ins. Co.*, 67 Fed. 585.

disagreement had occurred and an arbitration had been demanded after the first but prior to the second fire, *quaere*.⁷²

SELECTION OF ARBITRATORS AND UMPIRE.

§ 213. The referees or arbitrators are sometimes designated in the contract, but the more common practice is simply to provide suitable machinery to secure their selection.

The appraisers and the umpire must be competent and disinterested.

They act in a quasi-judicial capacity, and must be so situated with relation to the parties and the matters in dispute as to be able to deal fairly and impartially without bias or prejudice.

There is no objection to parties agreeing on the referee or arbitrators in the policy; but the conditions more usually provide for the selection only when the occasion arises for referees. In Pennsylvania provisions in policies requiring arbitration are merely executory, and are not enforceable or binding unless the arbitrators are mentioned in the policy itself.⁷³ A provision that the amount of compensation to be paid in a given case should be referred to the decision of one named by the secretary of the Master of the Rolls for the time being and that his award shall be final, has been sustained.⁷⁴ And a condition that a life insurance policy will be paid only if in the opinion of the surgeon-in-chief of the company the party assured should not die of intemperance, nor by any disease aggravated or caused thereby, is valid and binding on the parties; and its performance must be pleaded and proved or non-performance properly accounted for. But if such surgeon be a stockholder of the company and his dividends are to be affected by the payment of the claims, and these

⁷² *Mechanics' Ins. Co. v. Hodge*, 46 Ill. App. 479, 149 Ill. 305.

⁷³ *Commercial Union Assur. Co. v. Hocking*, 115 Pa. St. 407; *Mutual Fire Ins. Co. v. Rupp*, 29 Pa. St. 528; *Penn Plate Glass Co. v. Spring Garden Ins. Co.*, 189 Pa. St. 255.

⁷⁴ *Braunstein v. Accidental Death Ins. Co.*, 1 Best & S. 783.

facts were concealed from the insured at the time the policy was made and accepted, this may constitute a sufficient excuse for the non-performance.⁷⁵

Provisions are in common use requiring the certificate of some magistrate or notary public to be appended to the statement of facts contained in the proofs of loss.⁷⁶ They have been held invalid where they attempt to make the rights of the claimant depend upon the arbitrary action of the officer of the insurer.⁷⁷ But the mere fact that an arbitrator is a fellow member with the claimant in a mutual organization does not disqualify him from acting.⁷⁸

After making a submission each party must, upon being notified of the selection of an appraiser by the other party, proceed with reasonable speed in selecting his appraiser and in taking steps to further the appraisal proceedings.⁷⁹ A party choosing an appraiser is under the duty to select one who will act promptly in choosing an umpire if it becomes necessary; one who will act properly throughout the proceedings; or, on his failure so to do, to replace him with another; and the other party without fault of his own will not be made to suffer for his opponent's dereliction in this respect.⁸⁰

⁷⁵ *Campbell v. American Popular Life Ins. Co.*, 1 MacArthur, D. C. 471; *Young v. Grand Council, A. O. A.*, 63 Minn. 506; *May, Ins.* p. 1110; *Schreiber v. German-American Hail Ins. Co.*, 43 Minn. 372.

⁷⁶ See post, "Proofs of Loss."

⁷⁷ *Young v. Grand Council, A. O. A.*, 63 Minn. 506.

⁷⁸ *Raymond v. Farmers' Mut. Fire Ins. Co.*, 114 Mich. 386, 72 N. W. 255.

⁷⁹ *Schouweiler v. Merchants' Mut. Ins. Ass'n*, 11 S. D. 401, 78 N. W. 356.

⁸⁰ *Read v. State Ins. Co.*, 103 Iowa, 307, 72 N. W. 665; *McCullough v. Phoenix Ins. Co.*, 113 Mo. 606; *Chapman v. Rockford Ins. Co.*, 89 Wis. 572, 28 L. R. A. 405. In Pennsylvania the rule is that one refusing or neglecting to appoint an appraiser is not concluded by the amount fixed by the appraisers of the other party, but is estopped to claim the advantage of provisions making an appraisal a condition

The policies often require that the amount of the loss be referred to and determined by "disinterested" or "competent and disinterested" appraisers. The meaning of the word "competent" is easily arrived at. It means simply that the appraisers must have ordinary business experience and ability which qualify them to deal with the matters in controversy. The word "disinterested" does not mean simply a lack of pecuniary interest, but requires the appraiser to be one who is not biased or prejudiced, so that by whomsoever chosen, he can decide matters submitted to him impartially and with the same judicial fairness as a judge or juror. Appraisers ought to enter upon the discharge of their duty in such a frame of mind, and occupying such a position with relation to both parties, as leaves them free to act in a quasi-judicial capacity as a court selected by the parties, free from any partiality or bias in favor of either party; and so as to do equal and exact justice between them. It is the duty of the appraisers to give a fair and just award, one which shall fairly and honestly represent the real loss actually sustained; and it is not a duty of either appraiser to see how far he can depart from that purpose and still obtain the consent or agreement of his associate, or in case of his refusal, then the consent or agreement of the umpire. It is proper, and to be expected, that all of the facts which may be favorable to the party nominating him shall be brought out by an appraiser so that due weight may be given to them; but the appraiser is in no sense, for the purpose of the appraisal, the agent of the party appointing or nominating him; and he remains at all times under the duty to be fair and unprejudiced or in the language of the policy "disinterested."⁸¹

precedent. *Penn Plate Glass Co. v. Spring Garden Ins. Co.*, 189 Pa. St. 255. See ante, "Demand for Arbitration," and post, "Waiver of Arbitration."

⁸¹ *Bradshaw v. Agricultural Ins. Co.*, 137 N. Y. 137; *Read v. State*

The mere fact that the person selected as appraiser is a public adjuster of fire losses will not render him incompetent. In *Meyerson v. Hartford Fire Ins. Co.*,^{81a} the plaintiff nominated three persons, each of whom was successively rejected by the company. The last person nominated by plaintiff had been a partner of the person who was in charge of plaintiff's business. The company objected to him on this account and the court said: "The [mere] fact that * * * [the party proposed] had about two months previously been a partner of * * * [the plaintiff's agent] did not *per se* make him interested; * * * nor did the fact that he had formerly been an insurance adjuster necessarily make him interested; hence the question whether there was any force in the objection [of the insurance company to the appraiser suggested by plaintiff on the grounds of interest] was * * * properly submitted to the jury, and their finding should * * * be regarded as conclusive. The fact that * * * [one of the men proposed by plaintiff] had been an insurance adjuster would certainly tend to prove his competency for the task he was to assume, and the condition of the policy requires the appraiser to be not only disinterested, but competent." An award is not void because one of the appraisers had been an employee of the insurance com-

Ins. Co., 103 Iowa, 307, 72 N. W. 665; *Meyerson v. Hartford Fire Ins. Co.*, 17 Misc. Rep. 121, 39 N. Y. Supp. 329; *Chandos v. American Fire Ins. Co.*, 84 Wis. 184; *Pullman v. North British Mercantile Ins. Co.*, 159 Mass. 118, 34 N. E. 169; *Hickerson v. German American Ins. Co.*, 96 Tenn. 193, 32 L. R. A. 172; *Brock v. Dwelling House Ins. Co.*, 102 Mich. 583; *Niagara Fire Ins. Co. v. Bishop*, 154 Ill. 9; *McCullough v. Phœnix Ins. Co.*, 113 Mo. 606; *Bishop v. Agricultural Ins. Co.*, 130 N. Y. 488; *Springfield F. & M. Ins. Co. v. Payne*, 57 Kan. 291, 46 Pac. 315; *Union R. Co. v. Dull*, 124 U. S. 173, 8 Sup. Ct. 433; *Young v. Grand Council, A. O. A.*, 63 Minn. 506; *Campbell v. American Popular Life Ins. Co.*, 1 MacArthur, D. C. 471; *Levine v. Lancashire Ins. Co.*, 66 Minn. 138, 68 N. W. 855; post, notes 147-149.

^{81a} 39 N. Y. Supp. 329.

pany, while the other had been in employ of the insured and the two agreed on the extent of the loss without an umpire.⁸² The prior service of an arbitrator in the same capacity does not necessarily render him incompetent to act in subsequent matters. Any known disqualification of an arbitrator is waived by failure to promptly except to his appointment.⁸³

The Umpire.

Some policies provide for the selection of three disinterested and competent persons to appraise the loss, one selected by each of the parties to the controversy and these two in turn selecting a third of like qualifications. In such case there are three appraisers of equal and co-ordinate powers and duties. Other policies provide for the selection of an umpire only in case the arbitrators cannot agree. There is then no occasion for the selecting of an umpire until after it becomes apparent that the arbitrators cannot arrive at an award. The umpire should be chosen with the same care as the appraisers and should have the same qualifications. If a suitable man can be found living in the vicinity of the loss, he should be selected. In *Brock v. Dwelling House Ins. Co.*,⁸⁴ the defendant's appraiser insisted upon the appointment of a person with whom he was presumably acquainted and who was a stranger to the locality of the loss and to plaintiff's appraiser. The latter offered the names of twelve persons resident in the locality from which the jury in case of suit would

⁸² *Remington Paper Co. v. London Assur. Corp.*, 43 N. Y. Supp. 431; *Union R. Co. v. Dull*, 124 U. S. 173, 8 Sup. Ct. 433.

⁸³ *Stemmer v. Scottish U. & N. Ins. Co.*, 33 Or. 65, 53 Pac. 498. The mere failure of the insured to choose a competent and unprejudiced appraiser does not of itself work a forfeiture of his demand for an appraisal, nor excuse the insurer from taking steps to secure other appraisers. *Germania Fire Ins. Co. v. Frazier*, 22 Ill. App. 327.

⁸⁴ 102 Mich. 583.

be drawn. No valid reason was assigned for the refusal to accept one of the twelve. The court said: "The agreement [stipulation in the policy] does not contemplate that the umpire shall be selected at random, or without some knowledge on the part of both appraisers as to his competency and fitness. Parties living in the locality [of the fire] would naturally be best qualified to pass upon the question of values, and an appraiser would not be under obligation to make trips to other localities than that of the fire to ascertain as to the propriety of appointing the person suggested as an umpire. The agreement contemplates an inexpensive mode of settlement. Strangers to the locality are not usually selected as appraisers, and, in case of the inability of the appraisers to agree, a third party, known to both, and in whom both have confidence, is supposed to be selected. * * * The requirement that plaintiff's appraiser should go into other portions of the state to make inquiry as to the fitness of the persons named [as appraisers] was not a reasonable one. The suggestion that some one be selected from the locality of the fire was not unreasonable;" and such conduct on the part of the appraiser of the insurer amounts to a refusal to proceed with the appraisal, and warrants the insured in bringing suit without an appraisal.⁸⁵

If an umpire is not chosen, owing to the interference or misconduct of either party with the purpose of delaying or preventing a submission or an award, such party is estopped from interposing the defense of no arbitration; and the arbitrary or unreasonable conduct or delay of the arbitrator in choosing an umpire when one becomes necessary is imputed to the

⁸⁵ *Hickerson v. German American Ins. Co.*, 96 Tenn. 193, 32 L. R. A. 172; *Niagara Fire Ins. Co. v. Bishop*, 154 Ill. 9; *Bishop v. Agricultural Ins. Co.*, 130 N. Y. 488; *Uhrig v. Williamsburgh City Fire Ins. Co.*, 101 N. Y. 362.

party appointing him.⁸⁶ Any irregularities in the choosing of an umpire, or any disqualifications of either umpire or appraisers, are waived by the parties proceeding to a hearing with knowledge of these facts; and the failure to select an umpire is waived by the insured when he makes an award the basis of a suit.⁸⁷

Time of Choosing Umpire.

The proper time to choose the umpire must be determined from the wording of the policy. Where it reads: "The amount of damage in case of disagreement shall be ascertained by appraisers, one to be selected by each party, and the two so chosen shall first select an umpire to act with them in case of their disagreement; and, if the said appraisers fail to agree, they shall refer their differences to such umpire, and the award of any two in writing, under oath, shall be binding and conclusive,"—the omission of the appraisers to appoint an umpire before they proceed to appraise the loss does not invalidate the award. "Such third person is not strictly an umpire. * * * He is a third arbitrator, to be called in to act with the others after disagreement, and then any two of them make the award. * * * The time when an act is to be done * * * is not essential when it may as well be done later. * * * The umpire here can act only after disagreement of the arbitrators. Until then an umpire is not necessary. * * * The time, therefore, fixed in the contract, is not essential or material."⁸⁸ But if

⁸⁶ *Read v. State Ins. Co.*, 103 Iowa, 307, 72 N. W. 665. See post, "Waiver of Arbitration."

⁸⁷ *Morris v. German-American Ins. Co.*, 14 Ky. Law Rep. 859; *Finch*, Appraisal and Award, § 11. See cases *supra*.

⁸⁸ *Chandos v. American Fire Ins. Co.*, 84 Wis. 184, 54 N. W. 393; *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13; *Morse*, Arbitration, 241-243, 341; *Enright v. Montauk Fire Ins. Co.*, 15 N. Y. Supp. 893; *Knowlton v. Homer*, 30 Me. 552. But see *Adams v. New York*

the submission requires the appointment of an umpire an award by the appraisers without choosing an umpire is void.⁸⁹

CONDUCTING APPRAISAL.

§ 214. The appraisal must be conducted in good faith and with proper diligence so as to carry out the intent and purpose of the submission.

The appraisers should be governed in their proceedings by business sense, prudence and judgment rather than by strict rules of law.

The powers of the appraisers are exhausted when an award is returned.

It is the duty of the appraisers after being selected to proceed fairly and honestly and with reasonable celerity in appraising the loss or damage. They may conduct the investigation according to their own best judgment and may take or reject evidence as they see fit. They are not forced to follow the strict rules of law unless it be a condition of the submission that they shall do so.⁹⁰ If they act in good faith, neither party will be permitted to avoid the award by showing that they erred in judgment, either respecting the facts or respecting the law where the submission does not require them to follow the law. The evidence should be produced by the contending parties and all proper evidence offered should be received and considered. All matters submitted to them should be passed upon.⁹¹ If persons are selected as arbitrators by reason of special knowledge or skill possessed by them with

Bowery Fire Ins. Co., 85 Iowa, 6, 51 N. W. 1149; Hartford Fire Ins. Co. v. Bonner Mercantile Co. (C. C. A.), 56 Fed. 378.

⁸⁹ Mutual Fire Ins. Co. v. Alvord, 61 Fed. 752.

⁹⁰ Remelee v. Hall, 31 Vt. 583; Raymond v. Farmers' Mut. Ins. Co., 114 Mich. 386, 72 N. W. 254.

⁹¹ 6 Wait's Actions and Defences, 553; Merritt v. Merritt, 11 Ill. 565; Moore v. Barnett, 17 Ind. 349; Fudickar v. Guardian Mut. Life Ins. Co., 62 N. Y. 392; Boston Water Power Co. v. Gray, 6 Metc.

reference to the matter in controversy, so that it is apparent that the parties intended to rely upon their personal information, investigation and judgment rather than upon their consideration of evidence brought before them, they may even be justified in refusing altogether to hear evidence.⁹² They may consult experts and make inquiries for their own information in the absence of the parties and each in the absence of the other, and this will not invalidate an award unless it appears that one party was prejudiced and the decision was affected thereby.⁹³ The mere statement of the insured to the appraisers that he was willing to produce witnesses on value and the reply of the appraisers that if they needed witnesses, they could get them themselves, is not sufficient to put the appraisers in the position of rejecting relevant evidence.⁹⁴

The presumption is that the arbitrators proceeded properly and that everything was rightly done; that they did not exceed their powers and that they only appraised the proper loss.⁹⁵ But an award is not binding where one of the appraisers never saw the destroyed property and afforded the insured no opportunity to produce or impart information or evidence as to the character and value of the property;⁹⁶ nor where the

(Mass.) 131; *Goddard v. King*, 40 Minn. 164; *Canfield v. Watertown Fire Ins. Co.*, 55 Wis. 419.

⁹² *Morse*, Arbitration, 143; *Wiberly v. Matthews*, 91 N. Y. 648; *Eads v. Williams*, 24 L. J. Ch. 531; *Caledonian Ry. Co. v. Lockhart*, 3 Macq. H. L. Cas. 808; *Johnston v. Cheape*, 5 Dow, 247.

⁹³ *Morse*, Arbitration, 127, 167; *Finch*, Appraisal, 12; *Bangor Sav. Bank v. Niagara Fire Ins. Co.*, 85 Me. 68, 20 L. R. A. 650; *Straw v. Truesdale*, 59 N. H. 109; *Springfield F. & M. Ins. Co. v. Payne*, 57 Kan. 291, 46 Pac. 315; *Adams v. Bushey*, 60 N. H. 290.

⁹⁴ *Stemmer v. Scottish U. & N. Ins. Co.*, 33 Or. 65, 53 Pac. 498.

⁹⁵ *Karthaus v. Ferrer*, 1 Pet. (U. S.) 222; *Lutz v. Linthicum*, 8 Pet. (U. S.) 165; *Williams v. Paschall*, 4 Dall. (U. S.) 284; *Fire Ass'n of Philadelphia v. Colgin* (Tex. Civ. App.); 33 S. W. 1004.

⁹⁶ *Springfield F. & M. Ins. Co. v. Payne*, 57 Kan. 291, 46 Pac. 315; *Mosness v. German-American Ins. Co.*, 50 Minn. 341.

umpire receives the statement of the facts from the arbitrators alone in the absence of the parties and without hearing them.⁹⁷ And both parties are entitled to notice of the time and place of the meeting and to appear before the arbitrators.⁹⁸ In acquiring information and knowledge upon which to base their conclusions, the arbitrators should act together and as far as possible upon information obtained by them collectively.⁹⁹ Directions indorsed upon submission but not signed, are no part of the agreement and need not be followed.¹⁰⁰ The fraud or dishonesty of the appraiser of either party or his refusal to proceed promptly and according to the terms of the submission, or his unreasonable and arbitrary insistence upon proceeding in an unusual, or unfair way, or his refusal to make reasonable endeavors to agree upon an umpire, will justify the other in withdrawing from the appraisal.¹⁰¹

Where the policy provides that the two appraisers shall choose an umpire to whom they shall refer their differences, the umpire can only act when the arbitrators cannot agree, and the combined action of the two appraisers on the various items of the loss and their failure to agree are essential to the validity of an estimate made by one of them and the um-

⁹⁷ *Falconer v. Montgomery*, 4 Dall. (U. S.) 232.

⁹⁸ *Phoenix Ins. Co. v. Moore* (Tex. Civ. App.), 46 S. W. 1131.

⁹⁹ *Citizens' Ins. Co. v. Hamilton*, 48 Ill. App. 593.

¹⁰⁰ *Enright v. Montauk Fire Ins. Co.*, 15 N. Y. Supp. 893.

¹⁰¹ *Chapman v. Rockford Ins. Co.*, 89 Wis. 572, 62 N. W. 422; *Read v. State Ins. Co.*, 103 Iowa, 307, 72 N. W. 665; *Hickerson v. German American Ins. Co.*, 96 Tenn. 193, 32 L. R. A. 172; *Brock v. Dwelling House Ins. Co.*, 102 Mich. 583, 26 L. R. A. 623; *Powers Dry Goods Co. v. Imperial Fire Ins. Co.*, 48 Minn. 380; *Braddy v. New York Bowery Fire Ins. Co.*, 115 N. C. 354; *Niagara Fire Ins. Co. v. Bishop*, 154 Ill. 9; *McCullough v. Phoenix Ins. Co.*, 113 Mo. 606; *Bishop v. Agricultural Ins. Co.*, 130 N. Y. 488. And the refusal by an appraiser appointed by the insured to go on with the arbitration unless all the property is appraised, including a part claimed by the com-

pire.¹⁰² And if the appraisers agree, the umpire is not required to participate.¹⁰³ Where two arbitrators are appointed, and they, on failing to agree, choose an umpire, an award made without notice to all is invalid.¹⁰⁴ In New Jersey it is held that after a disagreement of the arbitrators as to the amount of damage, either of them may request the umpire to attend at a specified time and place to complete the appraisal. Of this, he must give his fellow arbitrator due notice, and if the latter in bad faith endeavors to prevent or delay further action by refusing to attend or participate, the former, with the umpire, can make a valid appraisal and award.¹⁰⁵ But the law on this point is in dispute.¹⁰⁶

By the making and rendition of an award, the appraisers exhaust their powers as such, and they have thereafter no right to alter or amend the award they have made, nor to make an additional or supplemental award without the consent of all parties.^{106a}

FAILURE OF ARBITRATORS TO AGREE.

§ 215. Where the failure of an appraisal is due to the improper interference, fraud or misconduct of either party to the

pany not to be covered by the policy, without specifying the damage on each class of property separately, is unreasonable, and will prevent an action on the policy. *Michel v. American Cent. Ins. Co.*, 17 App. Div. 87, 44 N. Y. Supp. 832.

¹⁰² *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13; *Manufacturers' & B. Fire Ins. Co. v. Mullen*, 48 Neb. 620, 67 N. W. 445; *Hills v. Home Ins. Co.*, 129 Mass. 345, 9 Ins. Law J. 814. But see *Broadway Ins. Co. v. Doying*, 55 N. J. Law, 569.

¹⁰³ *Enright v. Montauk Fire Ins. Co.*, 15 N. Y. Supp. 893.

¹⁰⁴ *Linde v. Republic Fire Ins. Co.*, 18 Jones & Sp. (N. Y.) 362.

¹⁰⁵ *Broadway Ins. Co. v. Doying*, 55 N. J. Law, 569. See note 107; *Yendel v. Western Assur. Co.*, 21 Misc. Rep. 349, 47 N. Y. Supp. 141.

¹⁰⁶ *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13; *Manufacturers' & B. Fire Ins. Co. v. Mullen*, 48 Neb. 620, 67 N. W. 445; *Hills v. Home Ins. Co.*, 129 Mass. 345, 9 Ins. Law J. 814.

^{106a} *Eddy v. London Assur. Corp.*, 65 Hun, 308, 20 N. Y. Supp. 216.

submission, the other party, if himself innocent, is absolved from compliance with the conditions of the policy regarding an appraisal.

The authorities disagree as to the effect of the failure of an appraisal when both parties have honestly but ineffectually endeavored to obtain an award in accordance with the terms of the contract.

Where arbitration in case of disagreement as to the amount of damage is by the terms of the policy a condition precedent to the maintenance of an action on the policy, and the arbitrators having been duly selected cannot discharge their duty in any particular, for instance, cannot agree upon the selection of an umpire, or cannot agree upon an award with or without an umpire, the rule is that, if, all parties having acted in good faith, and having honestly endeavored to arrive at an award, the arbitrators cannot agree upon an umpire, or if the umpire, being chosen, one of the arbitrators and the umpire, or so many as be necessary cannot agree upon an award, new appraisers and a new umpire ought to be chosen; if the insured refuses to submit to the terms of the policy, or if a failure to agree either upon an umpire or an award is due to the bad faith or misconduct of the insured, or his agent, or the appraiser selected by him, the insured cannot recover; if the failure to select an umpire or to arrive at an award is due to the fraud or misconduct of the insurer, or its agent, or appraiser, it will be estopped to plead the defense of no award.¹⁰⁷

¹⁰⁷ *Hamilton v. Liverpool & L. & G. Ins. Co.*, 136 U. S. 242, 10 Sup. Ct. 945; *Summerfield v. North British & M. Ins. Co.*, 62 Fed. 249; *Davenport v. Long Island Ins. Co.*, 10 Daly (N. Y.), 535; *Read v. State Ins. Co.*, 103 Iowa. 307, 72 N. W. 667; *Braddy v. New York Bowery Fire Ins. Co.*, 115 N. C. 354; *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13; *Powers Dry Goods Co. v. Imperial Fire Ins. Co.*, 48 Minn. 389; *Bishop v. Agricultural Ins. Co.*, 130 N. Y. 488; *Stockton Combined H. & A. Works v. Glens Falls Ins. Co.*, 98 Cal. 557; *Phoenix Ins. Co. v. Moore* (Tex. Civ. App.), 46 S. W. 1131. See ante, notes 101, 105, 106; post, 183.

Where the parties in their contract fix on a certain mode by which the amount to be paid shall be ascertained, the party that seeks an enforcement of the agreement must show that he has done everything in his power which can be done to carry it into effect. He cannot compel the payment of the amount claimed unless he shall procure the kind of evidence required by the contract or show that by time, or accident, or through improper interference of the other party, he was unable so to do. The making of an appraisal and award a condition precedent to the maturity of the liability of the insurance company and to the maintenance of his action, casts the burden of bringing about the appraisal upon the insured, because the company is not required to act or to pay until this appraisal is procured; and the insured has the option to procure it, or attempt to procure it, and to press his claim, or to abandon it. The mere appointment by the insured of an appraiser who could not or would not agree with his associate upon an umpire, and whose disagreement necessarily prevented the appraisal and award, falls far short of a compliance with the rule requiring an insured to show that he has done everything in his power which can be done. The insured might have revoked the appointment and have selected another appraiser. He might have caused his appraiser to propose a number of unexceptionable men as umpires and to request the appraiser of the company to choose from them. He might have caused his appraiser to request his associate to propose such men and to permit him to choose. He might have requested the insurer to agree with him upon other appraisers. These are but the ordinary means to choose an umpire which would occur at once to everyone, who really sought to secure a choice, and without resorting to all of them or taking action to procure an appraisal other than the appointment of an inactive appraiser, the insured has not done all

that he can do to bring about an appraisal and award. In such a case the insured is bound to do everything in his power to have the damage ascertained according to the mode provided for.¹⁰⁸

In *Wolff v. Liverpool & L. & G. Ins. Co.*, the fact that two appraisers had been appointed under a stipulation in a policy making arbitration a condition precedent to suit, but had gone no further and had made no award, was held fatal to plaintiff's right to recover; and in *Carroll v. Girard Fire Ins. Co.*, the supreme court of California held that under a similar stipulation a complaint which showed a disagreement stated no cause of action unless it either pleaded an award, or the fact that a fair award had been prevented by the fraudulent conduct of the insurer. In *Hood v. Hartshorn*, three arbitrators had been appointed but had failed to agree under a stipulation in a lease to the effect that the lessee should receive from the lessor the amount found by them to be the value of his improvements. The court

¹⁰⁸ *United States v. Robeson*, 9 Pet. (U. S.) 319; *Read v. State Ins. Co.*, 103 Iowa, 307, 72 N. W. 665; *Davenport v. Long Island Ins. Co.*, 10 Daly (N. Y.), 535; *Wolff v. Liverpool & L. & G. Ins. Co.*, 50 N. J. Law, 453; *Carroll v. Girard Fire Ins. Co.*, 72 Cal. 297; *Yendel v. Western Assur. Co.*, 21 Misc. Rep. 349, 47 N. Y. Supp. 141; *Hood v. Hartshorn*, 100 Mass. 117; *Levine v. Lancashire Ins. Co.*, 66 Minn. 138, 68 N. W. 855. "If the contract provides for arbitration, and the appraisers severally appointed by the company and the insured fail to agree on a third, this does not justify suit. The insured should propose a new selection of appraisers." May, Ins. § 496b.

In *Davenport v. Long Island Ins. Co.*, 10 Daly (N. Y.), 535, two appraisers, who had been appointed, had failed to agree upon a third. The insured then brought his action. The court held that, as arbitration was a condition precedent, the action could not be maintained, saying: "I do not think that the plaintiff has complied with the rule, * * * which requires him to do everything in his power to have the agreement carried into effect, and the damage ascertained in the mode provided for in the contract. Having been notified by the appraiser selected by him of the failure of the two selected to agree upon a third as an umpire, it was his duty at least to propose to the

said: "In the present case no appraisers are named [in the contract], but each party is to act in their selection. If then one set of appraisers fail to agree, or if they act in such a manner as to render them absolutely unfit to decide the matter, another appointment should be made; and a fair interpretation of the contract requires the lessee to use all reasonable efforts in his power in order to obtain suitable appraisers who will agree. He must continue to act until he puts the lessor in the wrong, or else makes it manifest that no suitable persons can be obtained to do the service within a reasonable time."

This rule may not apply where arbitration is not a condition precedent to the insured's right of action, but is simply an optional right of which either party may avail himself. There is then no greater duty resting upon the insured to secure an arbitration and an award than there is upon the defendant. After an agreement had been signed, it would be the duty of both parties to act in good faith to have the loss ascertained as provided in the policy and if either party, either personally or through his appraiser, prevented such ascertainment by refusing to proceed, or by insisting upon the selection of an improper umpire, or by undue interference after the umpire had been selected, or in any other way, the opposite party would be thereby absolved from further obligation to arbitrate. If such fraud were attributable to the insured, it would be a defense to any action on the policy; if to the insurer the lack of an award would not be available as a defense to defeat a recovery. If both parties had done all that could reasonably be expected of them to secure an award,

defendants that they should each select new appraisers, that the condition precedent might in good faith be complied with."

See, also, dissenting opinion of Judge Sanborn in *Western Assur. Co. v. Decker*, 98 Fed. 381, 39 C. C. A. 383, 29 Ins. Law J. 312.

there would be no breach of duty on the part of either of which the other could complain and they would be relegated to the ordinary remedy at law.¹⁰⁹

The insured performs his duty in attempting to have an appraisal pursuant to a submission, by making reasonable efforts to get the attendance of the arbitrator of the insurer at a meeting with his own arbitrator, and by serving notice on the insurer of a proper time and place of meeting.¹¹⁰ In a North Carolina case the arbitrators were duly appointed, but disagreed, and refused to go on, and finally separated without making an award. Subsequent attempts to agree upon another board failed, and the court laid down the rule that where the arbitrators or a majority of them failed to agree upon an award, the insured, in the absence of any evidence of bad faith or improper conduct, is not compelled to submit to another arbitration and another delay, but may forthwith bring his action in the courts.¹¹¹ Where the arbitrators properly chosen are, after the investigation of the loss in question, unable to agree and refuse to go further, it is not unreasonable for the insured to refuse to enter on a second arbitration proposed a month later by the insurer, unless the latter will consent to waive a condition in the policy that damages shall not become due until sixty days after notice of the amount awarded.¹¹² Some policies provide for a new arbitration in case of failure of the first attempt. In such case the second

¹⁰⁹ *Harrison v. German-American Fire Ins. Co.*, 67 Fed. 577; *Connecticut Fire Ins. Co. v. Hamilton*, 8 C. C. A. 114, 59 Fed. 265; *Western Assur. Co. v. Hall*, 120 Ala. 547, 24 So. 939; *Western Assur. Co. v. Decker*, 98 Fed. 381, 39 C. C. A. 383, 29 Ins. Law J. 312.

¹¹⁰ *Harrison v. German-American Ins. Co.*, 67 Fed. 577.

¹¹¹ *Pretzfelder v. Merchants' Ins. Co.*, 116 N. C. 496.

¹¹² *Michel v. American Cent. Ins. Co.*, 17 App. Div. 87, 44 N. Y. Supp. 832.

demand and proper effort to secure an award pursuant thereto are as essential as the first, where these latter have proved futile.¹¹³

WHO BOUND BY AWARD.

§ 216. An arbitration and award binds only those parties who have been properly requested or notified to join in it, and those parties who have actually participated in the proceedings.

All parties interested in the loss, and whose rights are recognized in the policy, or have been recognized by the insurer and insured, should be requested to join in the appraisal. The appraisal and award will bind only those parties who have been properly notified and requested to join in, or those who have actually joined in them. A mortgagee is entitled to be a party to an arbitration on a loss under an insurance policy taken out by the mortgagor and delivered to him with an indorsement that the loss, if any, should be payable to the mortgagee as his interest may appear, or to a specified amount, where the policy provides for an arbitration on the request of either party. And an arbitration and award by the mortgagor and insurer without notice to the mortgagee and without his participation does not bind the latter.¹¹⁴ But an award as to the amount of a loss made under an agreement between the company and the insured, is, until vacated for fraud or other sufficient reason, binding

¹¹³ *Russell v. North American Ben. Ass'n*, 116 Mich. 699, 75 N. W. 137.

¹¹⁴ *Bergman v. Commercial Assur. Co.*, 92 Ky. 494, 15 L. R. A. 270; *Georgia Home Ins. Co. v. Stein*, 72 Miss. 943; *Hathaway v. Orient Ins. Co.*, 134 N. Y. 409, 17 L. R. A. 514; *Hall v. Fire Ass'n of Philadelphia*, 64 N. H. 405; *Brown v. Roger Williams Ins. Co.*, 5 R. I. 394. *Contra*, *Chandos v. American Fire Ins. Co.*, 84 Wis. 184, 19 L. R. A. 321; *Wunderlich v. Palatine Fire Ins. Co.*, 104 Wis. 395, 80 N. W. 474.

upon the mortgagee to whom the loss is made payable, where he participated in the arbitration.¹¹⁵

VALIDITY AND EFFECT OF AWARD.

§ 217. An award made by the appraisers in substantial accordance with the terms and requirements of the submission to them, is *prima facie* valid and binding upon the insured and insurer as to all matters acted upon by the appraisers within the scope of their powers and duties.

Any award may be set aside by the courts upon a proper showing.

Where insurer and insured pursuant to the provisions of a policy enter into a written contract submitting the amount of the loss or damage to a board of appraisers properly chosen, and proceedings are honestly and fairly conducted under such contract of submission finally terminating in an award, such award is valid and binding on them. By it the parties are bound; and to the amount awarded the insured is limited in his right to recover, unless such fraud or improper conduct or procedure is shown as will in law avoid the effect of the award.¹¹⁶ The award need not conform to the statutory provisions regulating arbitration unless specially included within such.¹¹⁷ It is not essential that it should be accepted or acted upon by the parties in order to make it effective and conclusive.¹¹⁸ Nor is it rendered contingent by the fact that an agent acting for one of the parties failed to furnish formal evidence of his authority in advance.¹¹⁹

¹¹⁵ *Scania Ins. Co. v. Johnson*, 22 Colo. 476, 45 Pac. 431, 25 Ins. Law J. 525; 2 Wood, Fire Ins. 370.

¹¹⁶ *Burchell v. Marsh*, 17 How. (U. S.) 344; *Hanover Fire Ins. Co. v. Lewis*, 28 Fla. 209; *Springfield F. & M. Ins. Co. v. Payne*, 57 Kan. 291, 46 Pac. 315; *Scania Ins. Co. v. Johnson*, 22 Colo. 476, 45 Pac. 431; *Hartwell v. Penn Fire Ins. Co.*, 60 N. H. 293.

¹¹⁷ *Enright v. Montauk Fire Ins. Co.*, 15 N. Y. Supp. 893.

¹¹⁸ *Hanover Fire Ins. Co. v. Lewis*, 28 Fla. 209, 10 So. 297.

¹¹⁹ *Royal Ins. Co. v. Roodhouse*, 25 Ill. App. 61.

The arbitrators must decide the whole matter submitted to them. The award must be certain, final and conclusive and must not extend to matters not comprehended in the submission. An award uncertain as to the amount of damages is void.¹²⁰ It is also void unless it includes all matters embraced in the submission, as where the arbitrators only appraised a portion of the articles damaged and undertook to determine that certain other articles enumerated in the submission were not covered by the policy.¹²¹ A mere assumption of unauthorized powers by the arbitrators will not affect the validity of an award properly arrived at within the lines of their duty.¹²² A valid award is binding upon both parties although a submission to appraisers was not a condition precedent to the commencement of the action because neither party had made a written demand therefor as required by the policy.¹²³ An award is not valid when arrived at by the umpire and only one appraiser without any showing of difference between the two appraisers. It is necessary that there be action by both of the appraisers, conference together and a result reached if possible by their combined action. The umpire has no authority to act except when the appraisers differ in their estimates.¹²⁴

¹²⁰ *St. Paul F. & M. Ins. Co. v. Gotthelf*, 35 Neb. 351, 53 N. W. 137; *Carnochan v. Christie*, 11 Wheat. (U. S.) 446; *Chandos v. American Fire Ins. Co.*, 84 Wis. 184, 54 N. W. 390; *York & C. R. Co. v. Myers*, 18 How. (U. S.) 246.

¹²¹ *Thompson v. Blanchard*, 2 Iowa, 44; *Adams v. New York Bowery Fire Ins. Co.*, 85 Iowa, 6, 51 N. W. 1149.

¹²² *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. (N. Y.) 125.

¹²³ *Springfield F. & M. Ins. Co. v. Payne*, 57 Kan. 291, 46 Pac. 315. See ante, "When Award Condition Precedent."

¹²⁴ *Manufacturers' & B. Fire Ins. Co. v. Mullen*, 48 Neb. 620, 67 N. W. 445; *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13; *Hills v. Home Ins. Co.*, 129 Mass. 345, 9 Ins. Law J. 814. But see *Broadway Ins. Co. v. Doying*, 55 N. J. Law, 569.

In a Wisconsin case the policy described the property insured as "a pulp-mill and the machinery therein" and provided for a decision by arbitrators as to the amount of loss. A fire occurred damaging the property insured and also a tram-way connected with and used with it. A disagreement as to the extent of damage existing, a reference was made to arbitrators who did not include in their award any damage on account of the tram-way which was not included in the schedules submitted to them nor was it called to their attention. The award was held valid, since there was nothing in the description of the property that would suggest a tram-way, and since it was the fault of the insured that the tram-way was not considered if it ought to have been.¹²⁵

A recovery is not limited to the amount of the award which through the fault of the adjuster for the insurer includes only damages to such goods as were visible at the time of the appraisement. In such case the insured can recover the loss on goods covered by the policy and not examined by the appraisers;¹²⁶ at least where the insured was not to blame for failure to have the entire loss appraised and no new appraisal was permitted by the insurer.¹²⁷ An award signed when incomplete in reliance upon the assurance of the adjusters for the insurer, and in misapprehension of the true facts, is not conclusive upon the insured.¹²⁸

Where an award is pleaded as the basis of an action, or as matter of defense to a suit brought on the policy, the opposing party may plead and prove facts avoiding it; and the one so doing takes upon himself the burden of proving facts which

¹²⁵ *Chandos v. American Fire Ins. Co.*, 84 Wis. 184, 54 N. W. 390.

¹²⁶ *Hong Sling v. Scottish U. & N. Ins. Co.*, 7 Utah, 441, 27 Pac. 170.

¹²⁷ *Lang v. Eagle Fire Co.*, 12 App. Div. 39, 42 N. Y. Supp. 539.

¹²⁸ *Herndon v. Imperial Fire Ins. Co.*, 110 N. C. 279; *Bradshaw v. Agricultural Ins. Co.*, 137 N. Y. 137.

constitute grounds for avoidance.¹²⁹ The death of the insured after submission of the question as to the amount of damage to arbitrators and before the rendition of the award, does not revoke the submission.¹³⁰

SETTING ASIDE AWARD.

§ 218. Every presumption exists in favor of the honesty and validity of an award.

It will only be set aside upon clear and strong proof of fraud, or misconduct, or when shown by such proof to be palpably and manifestly unfair, unreasonable and unjust.

Arbitrators are judges chosen by the parties to decide the matter submitted to them finally and without appeal. As a mode of settling disputes arbitration should receive every encouragement from the courts. If the award is within the submission, and contains the honest decision of the arbitrators after a full and fair hearing of the parties, a court will not set it aside either for error of law or of fact. A contrary course would substitute the judgment of the court in place of the judgment of those chosen by the parties to decide the controversy, and would make the award the commencement and not the end of litigation.¹³¹

An award will not be set aside for misrepresentation in its procurement, where the insured was induced to sign an agreement to submit to arbitration by the misrepresentation

¹²⁹ *Mosness v. German-American Ins. Co.*, 50 Minn. 341; *Connecticut Fire Ins. Co. v. O'Fallon*, 49 Neb. 740, 69 N. W. 118; *Remington Paper Co. v. London Assur. Corp.*, 43 N. Y. Supp. 431; *Canfield v. Watertown Fire Ins. Co.*, 55 Wis. 419, 13 N. W. 252.

As to effect of award by committee in mutual societies as a bar to a right of action, see ante, notes 3-8.

¹³⁰ *Citizens' Ins. Co. v. Coit*, 12 Ind. App. 161, 39 N. E. 766.

¹³¹ *Stemmer v. Scottish U. & N. Ins. Co.*, 33 Or. 65, 53 Pac. 498; *Burchell v. Marsh*, 17 How. (U. S.) 344; *Campbell v. American Popular Life Ins. Co.*, 2 Bigelow, Life & Acc. Cas. 25, 1 MacArthur, D. C. 471.

of the agent of the insurer that such a proceeding was necessary, when thereafter, and before signing the submission, he had the opportunity to examine the policy and ascertain its contents;¹³² nor because it was procured by misrepresentation of law, nor because of the partiality of the arbitrator of which the parties had knowledge prior to the making of the award. The proper remedy of the insured would be to revoke the submission before the award was made.¹³³ But an award will be set aside by the courts at the suit of a party not himself at fault upon a proper showing that the other party has been guilty of fraud, or conspiracy, or misconduct, either personally, or by the agent, or appraiser selected to act and acting for him. 'Until so set aside the award fixes the amount of recovery absolutely. Every presumption must be made in favor of the honesty and fairness of the award, and it should not be set aside except upon clear and strong proof.¹³⁴

If the material facts in an action to set aside an award are founded upon transactions and conversations between and within the exclusive knowledge of two persons who flatly contradict each other, the relief sought must be denied, since no more credit can be given in such case to the one who alleges a fact than to him who denies it.¹³⁵ The fact that the arbitrators agree as to the extent of the damage is, in the absence of any showing of conspiracy or collusion, almost conclusive evidence of good faith and fair dealing.¹³⁶

¹³² *Wheeler v. Watertown Fire Ins. Co.*, 131 Mass. 1.

¹³³ *Indiana Ins. Co. v. Brehm*, 88 Ind. 578; *Virginia Home Ins. Co. v. Gray*, 61 Ga. 515.

¹³⁴ *Mosness v. German-American Ins. Co.*, 50 Minn. 348; *Levine v. Lancashire Ins. Co.*, 66 Minn. 147; *Brush v. Fisher*, 70 Mich. 469, 38 N. W. 446; *Overby v. Thrasher*, 47 Ga. 10; *Liverpool & L. & G. Ins. Co. v. Goehring*, 99 Pa. St. 13; *Connecticut Fire Ins. Co. v. O'Fallon*, 49 Neb. 740, 69 N. W. 118.

¹³⁵ *Tilton v. United States Life Ins. Co.*, 8 Daly (N. Y.), 84.

¹³⁶ *Chandos v. American Fire Ins. Co.*, 84 Wis. 184, 54 N. W. 390.

It must always be borne in mind that the arbitrators are not bound by the same strict rules that govern judicial procedure; thus an award is not defective because the arbitrators or the umpire were not sworn, unless the submission requires the award to be made under oath;¹³⁷ nor because the arbitrators excluded evidence that would be admissible in a court of law;¹³⁸ nor because they consulted experts and made personal investigation of facts concerning matters in dispute, apart from the evidence produced by either party.¹³⁹ But both parties are entitled to a fair hearing, and to introduce evidence as to the amount of loss or damage, and the exclusion of pertinent and material evidence by the arbitrators is usually fatal to the award where it appears probable that prejudice resulted to either party.¹⁴⁰

Errors in receiving improper evidence, or in excluding evidence which would be admissible in a court of law, are not alone sufficient grounds for setting aside an award, providing the appraisers have given their honest judgment on the subject matter after a full and fair hearing.¹⁴¹ The mere statement of the insured to the appraisers that he was willing to produce witnesses on value, and the reply of the appraisers that if they needed they would get witnesses themselves, are not sufficient to put the appraisers in the position of rejecting relevant evidence.¹⁴² An action may be properly brought to set aside an award and to recover on the policy. All the

¹³⁷ *Zallee v. Laclede Mut. F. & M. Ins. Co.*, 44 Mo. 530; *Hall v. Norwalk Fire Ins. Co.*, 57 Conn. 105; *Remelee v. Hall*, 31 Vt. 583.

¹³⁸ *Raymond v. Farmers' Mut. Ins. Co.*, 114 Mich. 386, 72 N. W. 255. See cases *supra*.

¹³⁹ *Morse*, *Arbitration*, 143; *Bangor Sav. Bank v. Niagara Fire Ins. Co.*, 85 Me. 68, 20 L. R. A. 650.

¹⁴⁰ *Mosness v. German-American Ins. Co.*, 50 Minn. 347.

¹⁴¹ *Burchell v. Marsh*, 17 How. (U. S.) 344. See cases *supra*.

¹⁴² *Stemmer v. Scottish U. & N. Ins. Co.*, 33 Or. 65, 53 Pac. 498.

relief sought can be granted in the same action and an arbitrator is a competent witness upon the trial of such an action and can testify to matters concerning the appraisal.¹⁴³

Neither error of judgment on the part of the appraisers, nor a mistake of fact made by them in arriving at a conclusion, will justify the setting aside of an award unless the error be clearly prejudicial, or the mistake gross or palpable.¹⁴⁴ But an appraisal will be set aside where it is grossly below the actual loss sustained and it appears that one of the appraisers was not disinterested.¹⁴⁵ "The party who seeks to set aside an award upon the ground of mistake must show from the award itself that but for the mistake the award would have been different. * * * The merits of an award, however unreasonable or unjust it may be, cannot be re-investigated, for otherwise the award, instead of being the end of litigation, would simply be a useless step in its progress. * * * In the absence of proof of corruption, bad faith, or misconduct on his [the arbitrator's] part, or palpable mistake appearing on the face of the estimate, neither party can be allowed to prove that he decided wrong as to the law or facts."¹⁴⁶

When a false statement is made in regard to the attitude of a proposed appraiser for the purpose of inducing consent to his appointment which is in fact in that way obtained, and where concealment is practiced in regard to his real attitude to the party nominating him, and when in fact he is not disinterested, good ground is shown for setting aside an appraisal which is grossly below the actual loss sustained although it has

¹⁴³ *Levine v. Lancashire Ins. Co.*, 66 Minn. 147.

¹⁴⁴ *Bates v. British American Assur. Co.*, 100 Ga. 249, 28 S. E. 155; *Liverpool & L. & G. Ins. Co. v. Goehring*, 99 Pa. St. 13.

¹⁴⁵ *Royal Ins. Co. v. Parlin & O. Co.*, 12 Tex. Civ. App. 572, 34 S. W. 401.

¹⁴⁶ *Sweet v. Morrison*, 116 N. Y. 19, 33, quoted in *Remington Paper Co. v. London Assur. Corp.*, 12 App. Div. 218, 43 N. Y. Supp. 431.

been concurred in and agreed to by the appraiser nominated by the other party.¹⁴⁷ Within this rule an appraiser is not "disinterested" where he has been frequently employed by the company in the case as well as by other companies to estimate losses, and where his opinion dominated that of the appraiser chosen by the insured, and the appraisal is much below the actual loss.¹⁴⁸ The fact that the arbitrator appointed by the insurer was instrumental in having an incompetent umpire selected whom he practically controlled, and that he refused to examine or consider the evidence offered by the insured as to the amount of his loss, justified setting aside the award.¹⁴⁹ And the suppression of evidence necessary and material to the proper estimation of the extent of the loss, and the withholding of books of account showing the cost of construction of the destroyed property by the bookkeeper of the insured without the knowledge or consent of his principal, is a sufficient ground for setting aside an award on the ground of fraud in suppressing and withholding evidence. "The books would have afforded some information to the defendant, and to that information it was entitled, not only under the terms of the policy issued by it [defendant to the plaintiff], but also upon the plainest principles of right and

¹⁴⁷ *Bradshaw v. Agricultural Ins. Co.*, 137 N. Y. 137; *Kiernan v. Dutchess County Mut. Ins. Co.*, 150 N. Y. 190; *Glover v. Rochester-German Ins. Co.*, 11 Wash. 143; *Niagara Fire Ins. Co. v. Bishop*, 154 Ill. 9; *Adams v. New York Bowery Fire Ins. Co.*, 85 Iowa, 6; *Hartford Fire Ins. Co. v. Bonner Mercantile Co.*, 44 Fed. 151. On question of interest of arbitrator, see *Union Ry. Co. v. Dull*, 124 U. S. 173, 8 Sup. Ct. 433.

¹⁴⁸ *Kiernan v. Dutchess County Mut. Ins. Co.*, 150 N. Y. 190. See, also, *Levine v. Lancashire Ins. Co.*, 66 Minn. 147; *Royal Ins. Co. v. Parlin & O. Co.*, 12 Tex. Civ. App. 572, 34 S. W. 401.

¹⁴⁹ *Levine v. Lancashire Ins. Co.*, 66 Minn. 147, 68 N. W. 855, 26 Ins. Law J. 36; *Springfield F. & M. Ins. Co. v. Payne*, 57 Kan. 291, 46 Pac. 315.

fair dealing; and the plaintiff cannot be permitted to enforce an agreement which * * * would never have been made but for the fraud of plaintiff's agent in withholding such information from the defendant—an agreement by which, under the findings of the court, * * * the defendant agreed to pay more than the value of the property destroyed.”¹⁵⁰ And whether or not the party has acted fairly or unfairly, honestly or dishonestly in the matters connected with the appraisal is usually a question for the jury.¹⁵¹

Effect.

Where by the terms of the policy arbitration is a condition precedent to a right of action, and an award is set aside for fault or misconduct of the arbitrators not participated in or caused by the insurer, the agreement for an appraisal still remains in force, and a new appraisal, if circumstances have not rendered that impossible, will still be a condition precedent to a right of action, unless waived.¹⁵² But upon the familiar rule that no man can take advantage of his own wrong, an insurer, to whose fraud or misconduct the setting aside or failure of an award is attributable, will not be allowed to interpose the plea of no award; and for a similar reason if the setting aside or failure of the award be attributable solely to the fault of the insured, the insurer is under no obligation to consent to a new submission.¹⁵³ Where

¹⁵⁰ *Stockton Combined H. & A. Works v. Glens Falls Ins. Co.*, 98 Cal. 557.

¹⁵¹ *Uhrig v. Williamsburgh City Fire Ins. Co.*, 101 N. Y. 365; *Liverpool & L. & G. Ins. Co. v. Goehring*, 99 Pa. St. 13; *Rademacher v. Greenwich Ins. Co.*, 75 Hun, 83, 27 N. Y. Supp. 155.

¹⁵² *Hiscock v. Harris*, 80 N. Y. 402; *Uhrig v. Williamsburgh City Fire Ins. Co.*, 101 N. Y. 362; *Levine v. Lancashire Ins. Co.*, 66 Minn. 147.

¹⁵³ *Braddy v. New York Bowery Fire Ins. Co.*, 115 N. C. 354; *Chapman v. Rockford Ins. Co.*, 89 Wis. 572, 62 N. W. 422; *Brock v. Dwel-*

an award has been made, which the insured claims was fraudulent and void, and rejected it in consequence, and so notified the insurer, the failure of the latter to ask for or suggest a new appraisal and its insistence on the validity of the award already made, both before suit and in its answer after action brought to recover on the policy, constitute a waiver of the right to a new appraisal.¹⁵⁴

EFFECT OF DEMANDING OR PARTICIPATING IN AWARD.

§ 219. The effect of a demand for or a submission to arbitration as to the amount of loss upon other rights or defenses of the parties depends upon the particular terms of the contract and the agreement for submission, construed in the light of the dealings of the parties with each other and the facts and circumstances of each case.

§ 220. A demand for a submission often waives

- (a) Stipulations regulating the time within which suit must be brought, or
- (b) Stipulations giving to the insurer the right to rebuild the damaged property, unless the effect of such stipulations is specially reserved and protected.

The mere submission of the amount of a loss to arbitration is not of itself an admission by the insurer that any liability existed against it under a policy covering the loss, nor does it raise an implied promise on the part of the insurer to pay the amount of the award. The distinction between adjusting the amount of damage done and the sum for which the insurer is liable, is very apparent. In the first case there would be a recognition of the extent of damage done by the fire; in the latter a recognized liability properly adjusted.¹⁵⁵

ling House Ins. Co., 102 Mich. 583; Powers Dry Goods Co. v. Imperial Fire Ins. Co., 48 Minn. 389.

¹⁵⁴ Levine v. Lancashire Ins. Co., 66 Minn. 147; Adams v. New York Bowery Fire Ins. Co., 85 Iowa, 6, 51 N. W. 1149.

¹⁵⁵ Willoughby v. St. Paul German Ins. Co., 68 Minn. 375; 2 Wood, Fire Ins. § 450.

An arbitration and award merely as to the amount of the loss, even if procured at the instance of the insurer, does not interfere with its right subsequently to deny liability upon the ground that the policy was void for reasons known to the assured at the time when the arbitration was instituted; especially where the policy contains a stipulation that the arbitration and award "shall not decide the liability of the company."¹⁵⁶ Where the policy does not contain any limitation as to the effect of demanding or submitting to arbitration, a demand by an insurer acquiesced in by the insured for arbitration according to the manner provided in the policy under which there has been a fire loss waives, (a) the furnishing of any proofs of loss by the insured, or (b) any defects in proofs which have been previously furnished, even though the furnishing of proofs is a condition precedent to the maturing of liability;¹⁵⁷ but evidence of a submission has been held insufficient proof of the waiver of the condition requiring insured to furnish a particular account of the loss upon which to charge the insurers in foreign attachment as proceeds of the insurance where any waiver is denied.¹⁵⁸ The fact that an award has been made under the conditions of a policy will not prevent the insurer from thereafter asserting all defenses otherwise available to it in a suit upon the policy which provides that a submission to arbitration shall not be considered as a waiver of any of the rights or defenses of either party.¹⁵⁹

¹⁵⁶ *Briggs v. Firemans' Fund Ins. Co.*, 65 Mich. 52, 31 N. W. 616; *Johnson v. American Ins. Co.*, 41 Minn. 396.

¹⁵⁷ *George Dee & Sons Co. v. Key City Fire Ins. Co.*, 104 Iowa, 167, 73 N. W. 594; *Home Fire Ins. Co. v. Bean*, 42 Neb. 537, 60 N. W. 907; *Walker v. German Ins. Co.*, 51 Kan. 725, 33 Pac. 597; *Allemania Fire Ins. Co. v. Pitts. Exposition Soc. (Pa.)*, 11 Atl. 572.

¹⁵⁸ *Pettengill v. Hinks*, 9 Gray (Mass.), 169, 4 Bennett, Fire Ins. Cas. 227. But see *Allemania Fire Ins. Co. v. Pitts. Exposition Soc. (Pa.)*, 11 Atl. 572.

¹⁵⁹ *Mutual Fire Ins. Co. v. Alvord (C. C. A.)*, 61 Fed. 752.

An agreement that an adjustment shall be made without reference to any other terms or conditions of the policy is a reservation of the question of liability.¹⁶⁰

Effect on Stipulations Regulating Time to Sue.

Where a policy provides that no action for recovery thereon can be maintained unless commenced within twelve months next after the fire, and that no condition or provision of the contract or any forfeiture thereof shall be waived by any act or proceeding relating to an appraisal, the submission of the amount of damage to appraisers does not excuse the failure to bring suit within the required time; and this rule is not changed by the insolvency of the insurer even when the insured seeks to participate in the proceeds of the bankrupt estate.¹⁶¹ But stipulations that no suit shall be brought in case of disagreement of the parties as to the amount of loss until an award shall have been made, and that no action can be maintained unless brought within six months after a loss occurs, must be construed together, and an action can be maintained if brought within six months after the award has been made though more than six months may have elapsed since the fire took place.¹⁶²

Effect on Stipulation Giving Insurer Right to Rebuild.

The submission of the amount of loss to arbitrators is not in itself a waiver by the insurer of its right to an election to rebuild or repair, nor does it exclude the possibility of a

¹⁶⁰ *Queen Ins. Co. v. Young*, 86 Ala. 424.

¹⁶¹ *Willoughby v. St. Paul German Ins. Co.*, 68 Minn. 373, 71 N. W. 272.

¹⁶² *Barber v. Fire & Marine Ins. Co. of Wheeling*, 16 W. Va. 658; *Friezen v. Allemania Fire Ins. Co.*, 30 Fed. 352; *Vette v. Clinton Fire Ins. Co.*, 30 Fed. 668; *Harrison v. Hartford Fire Ins. Co. (Iowa)*, 80 N. W. 309. Compare *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92.

previous waiver, nor amount to an election to pay the loss, nor does it affect the status of the parties in any other particular where the policy expressly provides that the appraisal is without reference to any other question.¹⁶³ But in the absence of any such provision a demand by the insurer for arbitration precludes it from afterwards exercising the option to repair whether an award was reached or not. Under such a policy in the event of loss, the insurer can discharge its obligation in two ways: (1) by repairing or rebuilding, and (2) by the payment of the loss. Without arbitration the insurer can ascertain the actual loss; and this, it would seem, is quite sufficient to enable it to make a just election of the method it will pursue in making the damage good. An election to rebuild is a waiver of the right to arbitrate and *eo instante* converts the policy into a building contract. The demand for arbitration is, in the absence of any restrictive stipulation, an election to make payment.¹⁶⁴

WAIVER OF RIGHT TO ARBITRATION.

§ 221. The right to take advantage of the provisions of a policy concerning arbitration may be waived by either insurer or insured, either

(a) Expressly, or

(b) By words or conduct from which an intention to abandon the right is properly inferable, e. g.

(1) By neglecting or refusing to comply with the terms of a policy; or

(2) By improper conduct or unreasonable delay in the conducting of the appraisal.

§ 222. The insurer waives its right to demand an appraisal by denying liability under the policy before the time to demand an arbitration has expired.

¹⁶³ Aetna Ins. Co. v. Platt, 40 Ill. App. 191; Platt v. Aetna Ins. Co., 153 Ill. 113, 26 L. R. A. 853.

¹⁶⁴ Wynkoop v. Niagara Fire Ins. Co., 91 N. Y. 478; Briggs v. Firemans' Fund Ins. Co., 65 Mich. 52, 31 N. W. 616; McAllaster v. Ni-

The rights of both insurer and insured to an appraisal and award, whether absolute or contingent under the conditions of the policy, are subject to the general principles of the law of waiver and estoppel. The words, acts or conduct of either of the parties or both of them may be such as in the eyes of the law amount to a waiver of the right to demand an appraisal and award, or such as to estop both parties from insisting upon the exercise of that right. The waiver, if express, may be either oral or in writing; if implied, the acts constituting it must be of such a nature and done under such circumstances as clearly to evince an intention to abandon the privileges waived, and such as are properly and reasonably calculated to warrant the opposite party in believing that a waiver was intended and that a compliance with the stipulations of the policy regulating appraisal is not desired and would be of no effect.¹⁶⁵

A stipulation in a policy that no agent shall be held to have waived any of the conditions of a policy unless such waiver be in writing and indorsed thereon, does not apply to conditions to be performed after the loss has occurred. Therefore an adjuster can waive provisions making arbitration in accordance with the terms of the policy a condition precedent to suit by making a different agreement for arbitration.¹⁶⁶ The refusal of an insurer to submit to an appraisal upon a re-

agara Fire Ins. Co., 156 N. Y. 80, 50 N. E. 502; *Zalesky v. Iowa State Ins. Co.*, 102 Iowa, 512, 70 N. W. 187, 71 N. W. 433; *Elliott v. Merchants' & B. Fire Ins. Co.*, 109 Iowa, 39, 79 N. W. 452.

¹⁶⁵ *Scottish U. & N. Ins. Co. v. Clancy*, 83 Tex. 113. See c. 14, "Waiver of Proofs of Loss."

¹⁶⁶ *Harrison v. German-American Fire Ins. Co.*, 67 Fed. 577. As to the powers of agents to waive stipulations in policy, see c. 14, "Waiver of Proofs of Loss," and c. 8, "Agents."

The provisions of the Massachusetts statute to the effect that the failure by the insurer to do certain things shall constitute a waiver

quest of the insured after a previous refusal to arbitrate, is a waiver of its right to an appraisal and of a provision in the policy making appraisal a condition precedent to the right to maintain an action.¹⁶⁷ The parties can orally waive the arbitration clause in a policy.¹⁶⁸

The stipulations and conditions in a policy concerning arbitration do not restrict the right and capacity of the parties

of the right to arbitration is not exclusive of a waiver by other acts. *Lamson C. Store-Service Co. v. Prudential Fire Ins. Co.*, 171 Mass. 433, 50 N. E. 943.

¹⁶⁷ *Denton v. Farmers' Mut. Fire Ins. Co.*, 120 Mich. 690, 79 N. W. 929; *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291, 79 N. W. 1005. In this case, arbitration in case of disagreement was a condition precedent to a right of action. A total loss having occurred and the parties having failed to agree as to its amount, the insurer demanded an appraisal under the policy. The insured, acting in good faith, but under incorrect advice of counsel, refused to enter into a submission, and brought an action on the policy, which action was, on trial, dismissed, because of plaintiff's having refused to arbitrate. Thereafter the insurer offered to submit the amount of the loss to arbitrators, but the insurer refused to do so, claiming that the insured had by her previous conduct lost all rights under the policy. The insured then brought this action to recover the amount of damage to the property insured. There was no evidence that the insurer had lost any legal right or suffered any damage by the refusal and subsequent delay of the insured to agree to submit the amount of the loss to arbitration. The court held that the conduct of the plaintiff in the first instance was not an election between inconsistent remedies or rights, which prevented her from afterwards enforcing whatever rights she possessed; that her refusal at first to arbitrate merely amounted to a waiver of her right to an appraisal, but did not extinguish her right to recover; that the refusal of the insurer to arbitrate upon the subsequent offer of the insured to do so was a waiver of its right to an appraisal, which entitled the insured to bring an action without an appraisal; that, since the loss was not payable until after an award, the insured was not entitled to interest on the amount of the loss until she offered to arbitrate. *Johnson v. Phoenix Ins. Co.*, 69 Mo. App. 226.

¹⁶⁸ *Hutchinson v. Liverpool & L. & G. Ins. Co.*, 153 Mass. 143, 10 L. R. A. 558; *Georges v. Niess*, 70 Minn. 248, 73 N. W. 644.

to make any lawful contract, e. g. to waive submission to arbitration entirely, or to provide for a material change as to the terms, manner and form of submission. The provisions of the policy respecting the powers and duties of the appraisers and umpire are presumptively superseded by a written agreement for a submission entered into by the parties after a loss has occurred.¹⁶⁹ An insurer, by entering into an agreement for submission to arbitration materially different in its terms and method from those provided for in the policy, waives its right to demand a new appraisal pursuant to the terms of the policy.¹⁷⁰ The conditions of a policy which contemplate an adjustment before the making of proofs of loss are waived by the insurer receiving and retaining without objection proofs furnished it without an appraisal having been had;¹⁷¹ and by a refusal to enter into a submission embracing all the property claimed by the insured to be covered by a policy though the insurer denies that it is so covered.¹⁷²

Where by the terms of the policy an appraisal is necessary

¹⁶⁹ *Harrison v. German-American Fire Ins. Co.*, 67 Fed. 578; *Bangor Sav. Bank v. Niagara Fire Ins. Co.*, 85 Me. 68, 20 L. R. A. 650; *Broadway Ins. Co. v. Doying*, 55 N. J. Law, 569.

Where, in response to a notice of a loss by fire, the general agent of the insurance company sent an adjuster, who examined the premises, and agreed with the insured to leave the question of the amount of the loss to one who was a carpenter, and to accept his estimate, after which the company took no further action in the matter, such action amounted to a waiver of the proofs of loss required by the policy, and rendered inapplicable a provision requiring arbitration in case of disagreement. *Wholley v. Western Assur. Co.*, 174 Mass. 263, 54 N. E. 548.

¹⁷⁰ *Schouweiler v. Merchants' Mut. Ins. Ass'n*, 11 S. D. 401, 78 N. W. 356; *Davis v. Atlas Assur. Co.*, 16 Wash. 232, 47 Pac. 436, 885. Compare *Adams v. New York Bowery Fire Ins. Co.*, 85 Iowa, 6, 51 N. W. 1150.

¹⁷¹ *American Fire Ins. Co. v. Stuart* (Tex. Civ. App.), 38 S. W. 395.

¹⁷² *George Dee & Sons Co. v. Key City Fire Ins. Co.*, 104 Iowa, 167, 73 N. W. 594.

only upon "written demand," the right to insist upon the appraisal is waived by a failure to make demand in the manner prescribed;¹⁷³ and by a failure to make seasonable demand where a demand is necessary.¹⁷⁴ Under any policy an appraisal is waived by the failure of either party to accede within a reasonable time to a demand for an appraisal, made by the other party.¹⁷⁵ Thus an insurer waives its right to an appraisal where proofs of loss are promptly served and an agreement for submission forwarded by the insured to which no reply was made within sixty days except by a letter of inquiry as to the address of the appraiser suggested;¹⁷⁶ and by taking possession of an injured property and proceeding to repair it with a view to making good the loss;¹⁷⁷ and by an insurer taking advantage of a provision of the policy giving it the right of election to rebuild and repair damaged property.¹⁷⁸ An insurer which neglects or refuses to take advantage of a provision of a policy in its favor giving it the right to arbitration, cannot complain if the insured brings suit to compel payment.¹⁷⁹ The insured has the right to

¹⁷³ *Hickerson v. German American Ins. Co.*, 96 Tenn. 193, 32 L. R. A. 172; *Phoenix Ins. Co. v. Badger*, 53 Wis. 283; *Nurney v. Firemans' Fund Ins. Co.*, 63 Mich. 633; *German-American Ins. Co. v. Steiger*, 109 Ill. 254.

¹⁷⁴ *Zimeriski v. Ohio Farmers' Ins. Co.*, 91 Mich. 600, 52 N. W. 55; *McNees v. Southern Ins. Co.*, 69 Mo. App. 233; *Brock v. Dwelling House Ins. Co.*, 102 Mich. 583, 61 N. W. 67.

¹⁷⁵ *Zalesky v. Home Ins. Co.*, 102 Iowa, 613, 71 N. W. 566; *Hooker v. Phoenix Ins. Co.*, 69 Mo. App. 141; *Schouweiler v. Merchants' Mut. Ins. Ass'n*, 11 S. D. 401, 78 N. W. 356.

¹⁷⁶ *Silver v. Western Assur. Co.*, 33 App. Div. 450, 54 N. Y. Supp. 27.

¹⁷⁷ *Harrison v. Hartford Fire Ins. Co. (Iowa)*, 83 N. W. 820; *Cobb v. New England Mut. Marine Ins. Co.*, 6 Gray (Mass.), 193.

¹⁷⁸ *Wynkoop v. Niagara Fire Ins. Co.*, 91 N. Y. 478; ante, note 164.

¹⁷⁹ *Wallace v. German-American Ins. Co.*, 41 Fed. 742; *Hickerson v. German American Ins. Co.*, 96 Tenn. 193, 32 L. R. A. 172; *Manchester Fire Ins. Co. v. Simmons*, 12 Tex. Civ. App. 607, 35 S. W. 722.

consider an appraisal waived when the insurer has made a demand for an appraisal and has subsequently abandoned the same without any fault on the part of the insured;¹⁸⁰ or when the insurer makes an unreasonable demand concerning the appointment of an umpire.¹⁸¹

If an award is set aside for cause not attributable to either party, the condition is still effectual, but where, after the making of an award, it was rejected by the insured, who claimed it was improper, fraudulent and void, the insurer, by insisting upon its validity and notifying the insured that any claim under the policy must be on the basis of that award and no other, waives its right to a new appraisal.¹⁸²

Delay or Bad Faith or Misconduct During the Appraisal.

After the provisions of the policy requiring an arbitration become operative, both insurer and insured are bound to act in good faith to have the loss ascertained in accordance with the provisions of the policy, and if either party acts in bad faith so as to defeat the real object of the arbitration as by refusing to proceed or by insisting on the selection of improper arbitrators or umpire, or by undue interference with any of them after their selection, the other party is absolved from further obligation to arbitrate and is not bound to enter into a new agreement for another arbitration. If such an arbitration is essential to the rights of the insured to maintain an action on the policy and the failure of the appraisal is in any way caused by his agency or procurement, that fact will

¹⁸⁰ Northern Assur. Co. v. Samuels, 11 Tex. Civ. App. 417, 33 S. W. 239.

¹⁸¹ Hickerson v. German American Ins. Co., 96 Tenn. 193, 32 L. R. A. 172.

¹⁸² Levine v. Lancashire Ins. Co., 66 Minn. 149; Adams v. New York Bowery Fire Ins. Co., 85 Iowa, 6, 51 N. W. 1149; Read v. State Ins. Co., 103 Iowa, 307, 72 N. W. 667.

destroy whatever of his rights depend upon an appraisal and will prevent his recovery. If the fault be that of the insurer, it will be estopped to defend upon the grounds, (1) that there has been no appraisal, and (2) that the insured has neglected to attempt to secure another appraisal. Neither a claimant nor an insurer can be tied up forever without his fault and against his will by an ineffectual arbitration.¹⁸³

Each party is bound by the acts of the appraiser selected by him. Thus the unreasonable demand of an appraiser for the selection of an improper umpire, or his refusal to proceed with the appraisal without unreasonable delay or his insisting upon proceeding in an unusual, prejudiced, biased or unfair manner or contrary to the terms of the submission or his insisting on adopting and adhering to dishonest or dilatory tactics amounts to a waiver of the right of his principal to an award.¹⁸⁴ The failure of either party to have its agent or appraiser present at the time fixed for the appraisement followed by a subsequent demand for another appraisal is an abandonment of the original submission.¹⁸⁵ An insurer

¹⁸³ *Uhrig v. Williamsburgh City Fire Ins. Co.*, 101 N. Y. 362; *Powers Dry Goods Co. v. Imperial Fire Ins. Co.*, 48 Minn. 389; *Bishop v. Agricultural Ins. Co.*, 130 N. Y. 488; *Hickerson v. German American Ins. Co.*, 96 Tenn. 193, 32 L. R. A. 172; *Stockton Combined H. & A. Works v. Glens Falls Ins. Co.*, 98 Cal. 557; *Liverpool & L. & G. Ins. Co. v. Goehring*, 99 Pa. St. 13; *Caledonian Ins. Co. v. Traub*, 83 Md. 524, 35 Atl. 13; *Zalesky v. Home Ins. Co.*, 102 Iowa, 613, 71 N. W. 566; *Western Assur. Co. v. Hall*, 120 Ala. 547, 24 So. 936; *Wainer v. Milford Mut. Fire Ins. Co.*, 153 Mass. 335, 11 L. R. A. 598.

¹⁸⁴ *Hickerson v. German American Ins. Co.*, 96 Tenn. 193, 32 L. R. A. 172; *Brock v. Dwelling House Ins. Co.*, 102 Mich. 583, 26 L. R. A. 623; *Braddy v. New York Bowery Fire Ins. Co.*, 115 N. C. 354; *Chapman v. Rockford Ins. Co.*, 89 Wis. 572, 62 N. W. 422; *Read v. State Ins. Co.*, 103 Iowa, 307, 72 N. W. 665; *McCullough v. Phoenix Ins. Co.*, 113 Mo. 606; *Niagara Fire Ins. Co. v. Bishop*, 154 Ill. 9.

¹⁸⁵ *Northern Assur. Co. v. Samuels*, 11 Tex. Civ. App. 417, 33 S. W. 239.

which fails to participate in an appraisal when one is demanded is not bound by the amount of the award, but is estopped to avail itself of the absence of an appraisal.¹⁸⁶

The insured is not bound to participate in an arbitration where he claims that the arbitrator appointed by the insurer is not disinterested and so informs the company, if his claim be well founded; and where after such an objection the insurer takes no action for a period of three weeks, the question whether or not the arbitrator was disinterested and whether or not the insurer should be held by its delay to have abandoned the arbitration are properly questions to be determined by a jury.¹⁸⁷ Where the policy makes arbitration in case of disagreement a condition precedent to the bringing of a suit, and gives the insurer the right to take the damaged property at the value fixed by the award, the insured by revoking a submission to arbitration and selling the goods avoids the policy and forfeits his right to recovery, but the insurer by afterwards examining the insurer under oath according to the provisions of the policy waives this forfeiture on the part of the insured.¹⁸⁸

Waiver by Denial of Liability.

An insurer by denying all liability under a policy when the insured in proper form and within the proper time demands an arbitration, waives the provisions of the policy providing for arbitration and award, even though these be conditions precedent to the bringing of an action on the policy; since,

¹⁸⁶ *Penn Plate Glass Co. v. Spring Garden Ins. Co.*, 189 Pa. St. 255, 28 Ins. Law J. 223.

¹⁸⁷ *Rademacher v. Greenwich Ins. Co.*, 75 Hun, 83, 27 N. Y. Supp. 155; *McManus v. Western Assur. Co.*, 22 Misc. Rep. (N. Y.) 269.

¹⁸⁸ *Morley v. Liverpool & L. & G. Ins. Co.*, 85 Mich. 210, 48 N. W. 503. Compare *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291, 79 N. W. 1005.

under such circumstances, there would be nothing left to arbitrate. Thus the provision for arbitration is waived where the company without referring to such provision upon receiving proofs of loss, admits its liability for part of the goods destroyed and denies further liability solely on the ground that the other goods mentioned in the proofs of loss and actually damaged were not covered by the policy;¹⁸⁹ or by denying liability on any ground that goes to the foundation of the contract;¹⁹⁰ as for instance that the policy has been cancelled.¹⁹¹ An insurer cannot demand an appraisal and arbitration while denying all liability under the policy;¹⁹² and waives its rights to arbitration where, after receiving a statement of claim (which it insisted was not in proper form) and a demand by the insured for the amount due under the policy, it made no request for arbitration and expressed a willingness to test the matter in the courts;¹⁹³ and by refusing to

¹⁸⁹ *Read v. State Ins. Co.*, 103 Iowa, 307, 72 N. W. 665; *Westfield Cigar Co. v. Insurance Co. of North America*, 169 Mass. 382, 47 N. E. 1026; *George Dee & Sons Co. v. Key City Fire Ins. Co.*, 104 Iowa, 167, 73 N. W. 594.

¹⁹⁰ *Yost v. McKee*, 179 Pa. St. 381; *Hickerson v. German American Ins. Co.*, 96 Tenn. 193, 32 L. R. A. 172; *Hamberg v. St. Paul F. & M. Ins. Co.*, 68 Minn. 335, 71 N. W. 388; *Wainer v. Milford Mut. Fire Ins. Co.*, 153 Mass. 335, 11 L. R. A. 598; *Stephens v. Union Assur. Soc.*, 16 Utah, 22, 50 Pac. 626.

The rejection by an insurer of a claim for loss waives a clause in the policy providing that, if the assured does not within a given time demand an arbitration of his claim, he will be bound by the award of the auditors of the company, and leaves the assured at liberty to sue. *Denton v. Farmers' Mut. Fire Ins. Co.*, 120 Mich. 690, 79 N. W. 929.

¹⁹¹ *Douville v. Farmers' Mut. Fire Ins. Co.*, 113 Mich. 158.

¹⁹² *Hickerson v. German American Ins. Co.*, 96 Tenn. 193, 32 L. R. A. 172.

¹⁹³ *Gnau v. Masons' Fraternal Acc. Ass'n*, 109 Mich. 527, 67 N. W. 546; *Hamberg v. St. Paul F. & M. Ins. Co.*, 68 Minn. 335, 71 N. W. 388.

submit to an appraisal according to the conditions of the policy unless certain additional duties were imposed upon the arbitrators.¹⁹⁴

But to constitute a waiver, a denial of liability must be made before the rights of the insured to demand an arbitration cease to exist; and a denial of all liability after the insured has refused to sign a submission to arbitration is no waiver.¹⁹⁵ Neither the failure of the insurer to admit liability, nor its demand for arbitration, amounts to a denial of liability which waives arbitration.¹⁹⁶ And a denial of liability after the amount of the loss has been ascertained by appraisal, does not waive the right of the insurer to insist that the appraisal is conclusive as to the amount of loss where there is an express stipulation that the appraisal shall not waive any of the conditions of the policy.¹⁹⁷

SAME — DENYING LIABILITY IN PLEADING.

§ 223. An insurer does not waive any rights by denying liability in its answer when sued.

An insurer is and ought to be permitted to plead and prove all the defenses it may have to any action brought against it without waiving any rights by so doing; and a defendant insurer does not, by denying in its answer all liability under the policy because of fraud of the insured or because of his failure to comply with the terms of the policy or by denying liability on any other ground, waive any other rights secured to it by the policy, or the defense of no arbitration. Speaking of

¹⁹⁴ *Hamilton v. Liverpool & L. & G. Ins. Co.*, 136 U. S. 242, 10 Sup. Ct. 945; *Summerfield v. North British & M. Ins. Co.*, 62 Fed. 249.

¹⁹⁵ *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 106 N. C. 28. See §§ 199-200, "Denial of Liability."

¹⁹⁶ *Western Assur. Co. v. Hall*, 120 Ala. 547, 24 So. 936.

¹⁹⁷ *American Cent. Ins. Co. v. Bass*, 90 Tex. 380, 38 S. W. 1119.

this matter a federal court has said: "This denial of liability *in toto* appears for the first time in the answer of the defendant in this suit. Up to that time the company had offered to pay its proportion of what it claimed was the actual loss of the insured. * * * It [the company] might waive any objection to the cause of the fire and offer to settle to avoid litigation, but this would not affect its right when sued to set up in its answer any legal defense it had to the action."¹⁹⁸ In Nebraska and Louisiana a contrary doctrine prevails, but the courts of these states seem to have overlooked the difference between the voluntary denial of liability by an insurer when an appraisal is demanded and an involuntary announcement of its legal position after suit has been brought.¹⁹⁹

Illustrations — No Waiver.

The pendency of negotiations for a compromise does not excuse a party from compliance with a demand that arbitration proceedings go on.²⁰⁰ The mere silence of the insurance company is not a waiver of the arbitration clause, where, after receiving proofs of loss from plaintiff, the company wrote the latter that it disputed the amount, and demanded an estimation under the contract;²⁰¹ nor is the action of an adjuster of the company in examining the scene of a fire and the extent

¹⁹⁸ *Kahnweiler v. Phoenix Ins. Co.*, 57 Fed. 562; *Yendel v. Western Assur. Co.*, 21 Misc. Rep. (N. Y.) 349; *Balmford v. Grand Lodge, A. O. U. W.*, 19 Misc. Rep. (N. Y.) 1; *Murphy v. Northern British & Mercantile Co.*, 61 Mo. App. 323; *La Plant v. Firemens' Ins. Co.*, 68 Minn. 82; *Employers' Liability Assur. Corp. v. Rochelle*, 13 Tex. Civ. App. 232, 35 S. W. 869.

¹⁹⁹ *Lewis Baillie & Co. v. Western Assur. Co.*, 49 La. Ann. 658; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473, 61 N. W. 743.

²⁰⁰ *Powers Dry Goods Co. v. Imperial Fire Ins. Co.*, 48 Minn. 380.

²⁰¹ *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116, 44 N. W. 1055.

of the loss.²⁰² The presentation of a builder's affidavit as to the amount of loss and the waiver by the insurer of formal proofs of loss do not, either separately or together, constitute a demand for an appraisal; nor does the failure of the insurer to act thereon give a right of action on a policy which provides for an award or for appointment of arbitrators at the written request of either party before bringing action thereon.²⁰³

²⁰² *Scottish U. & N. Ins. Co. v. Clancy*, 83 Tex. 113.

²⁰³ *Hutchinson v. Liverpool & L. & G. Ins. Co.*, 153 Mass. 143, 10 L. R. A. 558.

CHAPTER XVI.

PROCEEDS OF POLICY.

- § 224-226. Payment.
- 227-230. Assignment.
- 231. Right to Change Beneficiary.
- 232. Rights of Creditors.

PAYMENT.

§ 224. The proceeds of a policy of insurance are primarily payable (upon a proper showing) to the designated obligee.

§ 225. The effect of a "loss payable" clause in a policy of fire insurance is to make an appointment (either conditional or absolute) of the one named as payable of the whole or a part of the proceeds.

§ 226. The insurable interests of an owner and mortgagee are separate and distinct. A mortgagee has not, by mere virtue of his holding a lien upon insured property, any right in or to the proceeds of the policy of insurance taken out by an owner of that property for his own protection.

Fire.

A contract of fire insurance is essentially a contract for the indemnity of the insured. Its only legitimate purpose is to protect him against the damage which may be done to his property through or by fire. The extent and liability of the insurer, and the conditions and limitations of the risk, are fixed by the contract. When a loss or damage occurs to the insured property through, by, or on account of fire, and under the circumstances, and within the time and location described in the contract, which is in full force and effect, and when the insured, or one substituted in his place, and to his rights

under the contract with the consent of the insurer, thereby suffers a damage from which the insurer has undertaken to save him, the insured is entitled to recover of the insurer the amount of his actual loss or damage, without distinction between a partial and a total loss, not exceeding, however, the limit of liability fixed by the contract. The actual loss sustained by the insured is the full measure of the indemnity to which he is entitled. As a condition precedent to any recovery, therefore, the insured must show, first, that he had at some time during the running of the risk, and at the time of the loss, an insurable interest in the property insured; second, that the insurer has contracted to indemnify him in whole or in part, against the loss and damage; and third, that damage has occurred to the property insured, whereby he suffered pecuniary loss.¹

An insurable interest does not imply absolute ownership. It may be equitable or legal, vested or contingent.² A bailee, or commission merchant, or person holding goods in trust, may insure them in his own name, and recover for their entire value, holding in trust for the owners, the excess over his own interest.³ The amount of recovery is not limited to the amount of loss sustained by the individual interest of the assured, but includes damage to all interests covered by the

¹ Post *v. Hampshire Mut. Fire Ins. Co.*, 12 Metc. (Mass.) 555; *Illinois Mut. Fire Ins. Co. v. Andes Ins. Co.*, 67 Ill. 362; *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 311; *Morrison's Adm'r v. Tennessee M. & F. Ins. Co.*, 18 Mo. 262, 59 Am. Dec. 299; *Allen v. Home Ins. Co. (Cal.)*, 65 Pac. 138, 30 Ins. Law J. 711.

² See ante, c. 9, "Insurable Interest."

³ *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387; *Pittsburgh Storage Co. v. Scottish U. & N. Ins. Co.*, 168 Pa. St. 522, 32 Atl. 58; *Hope Oil M. C. & M. Co. v. Phoenix Assur. Co.*, 74 Miss. 320, 21 So. 132; *Ferguson v. Pekin Plow Co.*, 141 Mo. 161, 42 S. W. 711; *Home Ins. Co. v. Peoria & P. U. Ry. Co.*, 178 Ill. 64, 52 N. E. 862.

policy, so far as they are represented by him, whether as his own or by the precedent authority or subsequent ratification of others.⁴ A policy in favor of a supposed corporation, which was not legally organized, is enforceable.⁵ Where the policy agrees to make good to the insured, his executors, administrators, or assigns, all loss or damage, after the death of the assured, the administrator or executor, as the case may be, is the proper party to bring suit.⁶ The phrase "estate of A. B. deceased," has been held sufficient designation of an insured so as to extend the protection of the insurance to those beneficially interested in the estate,⁷ but this is doubtful law. The contract must be mutually binding upon parties capable in law of contracting. This an "estate" is unable to do.^{7a}

It has been held that, in the absence of fraud or mistake, unless otherwise provided by the contract of insurance, if the insured has some insurable interest in the property covered by the contract, the whole amount of damages to the property, not exceeding that named in the policy, is recoverable by him, if the damages reached that sum, or if, by the contract itself, and the law governing the subject, the face value of the contract must be taken as liquidated damages.⁸ During the year of redemption the mortgagor is entitled to recover the whole

⁴ *Trade Ins. Co. v. Barracliff*, 45 N. J. Law, 543; *Clement v. British American Assur. Co.*, 141 Mass. 298.

⁵ *Holbrook v. St. Paul F. & M. Ins. Co.*, 25 Minn. 229.

⁶ *Germania Fire Ins. Co. v. Curran*, 8 Kan. 9; *Appeal of Nichols*, 128 Pa. St. 428, 5 L. R. A. 597; *Savage v. Howard Ins. Co.*, 52 N. Y. 502.

⁷ *Phoenix Ins. Co. v. Hancock*, 123 Cal. 222, 55 Pac. 905.

^{7a} *Kenaston v. Lorig*, 81 Minn. 454, 84 N. W. 323.

⁸ *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Trade Ins. Co. v. Barracliff*, 45 N. J. Law, 543; *Trustees of St. Clara Female Academy v. Northwestern Nat. Ins. Co.*, 98 Wis. 257, 73 N. W. 770; *Clement v. British American Assur. Co.*, 141 Mass. 298.

amount of damage, up to the amount insured, irrespective of the value of his redeemable interest.⁹ A tenant for life of insured premises may recover their full value to the extent of the sum for which they were insured by him, and is not accountable to the remainderman for any portion thereof.¹⁰

A policy in the name of A, on account of whom it may concern, or with other equivalent terms, will enure to the benefit of the party for whom it was intended by A, provided he, at the time of effecting the insurance, had the requisite authority so to do from such party, or the latter subsequently ratified the act; and extrinsic evidence is admissible to show who is the real party concerned.¹¹

Loss Payable Clause.

A policy of insurance, issued to the owner of goods, with the provision, "loss, if any, payable to Jones, as his interest may appear," does not constitute a contract between the company and Jones, by which the separate interest of the latter in the property is insured. The legal effect of such a clause is to entitle him to receive, to the extent of his interest, the amount due from the insurer on account of the loss. The right of the appointee is not an independent right. He can only recover when the insured himself is entitled to recover, and is bound by any acts of forfeiture of the insured.¹²

⁹ *Buck v. Phoenix Ins. Co.*, 76 Me. 586; *Kane v. Hibernia Mut. Fire Ins. Co.*, 38 N. J. Law, 441. As to rights of purchaser of equity or sheriff's certificate, see *Carlson v. Presbyterian Board of Relief*, 67 Minn. 437; *Cushing v. Thompson*, 34 Me. 496.

¹⁰ *Harrison v. Pepper*, 166 Mass. 288. See, also, *Welsh v. London Assur. Corp.*, 151 Pa. St. 607, 31 Am. St. Rep. 786; *Western Assur. Co. v. Stoddard*, 88 Ala. 606; *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Green v. Green*, 50 S. C. 514, 46 L. R. A. 525, 27 S. E. 952.

¹¹ *Fire Ins. Ass'n v. Merchants' & Miners' Transp. Co.*, 66 Md. 339; *Hooper v. Robinson*, 98 U. S. 528; *Sturm v. Boker*, 150 U. S. 312.

¹² *Wunderlich v. Palatine Fire Ins. Co.*, 104 Wis. 395, 80 N. W. 471:

Rights of Mortgagor and Mortgagee.

A mortgagor and a mortgagee may each separately insure his own distinct interest in mortgaged property. If the mortgagee insures on his own account it is an insurance of his debt, and upon payment of his debt his insurance ceases. If insurance is effected by the mortgagor on his own account, he will, in case of loss, be entitled to recover the full amount, not exceeding the insurance, since the whole loss is his own.¹³ The mortgagee is not entitled to the proceeds of a policy taken out by the mortgagor or owner of the equity of redemption, in his own name, in the absence of any contract that the property shall be kept insured for the benefit of the mortgagee. But a mortgagee is entitled to an equitable lien on the proceeds of a policy obtained by the mortgagor, where the mortgage contains a covenant that the mortgagor will insure for the benefit of the mortgagee, or where the mortgagor contracted to insure for the benefit of the mortgagee, or where the policy is payable to the mortgagee as his interest may appear.¹⁴ The mortgagor is not entitled to the benefit of any insurance taken out by the mortgagee for himself.¹⁵

Ermentrout v. American Fire Ins. Co., 60 Minn. 418 (this case distinguishes between "loss payable to" and "loss payable to—as interest may appear"). *Bates v. Equitable Ins. Co.*, 10 Wall. (U. S.) 33; *Hathaway v. Orient Ins. Co.*, 134 N. Y. 409, 17 L. R. A. 514; *Hocking v. Virginia F. & M. Ins. Co.*, 99 Tenn. 729, 39 L. R. A. 148, 42 S. W. 451; *Scania Ins. Co. v. Johnson*, 22 Colo. 476, 25 Ins. Law J. 525, 45 Pac. 431; *Chandos v. American Fire Ins. Co.*, 84 Wis. 184, 54 N. W. 392.

¹³ *Carpenter v. Providence W. Ins. Co.*, 16 Pet. (U. S.) 495.

¹⁴ *Chipman v. Carroll*, 53 Kan. 163; *Carpenter v. Providence W. Ins. Co.*, 16 Pet. (U. S.) 495; *Hall v. Philadelphia Fire Ass'n*, 64 N. H. 405; *Reid v. McCrum*, 91 N. Y. 412; *Wheeler v. Factors' & Traders' Ins. Co.*, 101 U. S. 439; *Cromwell v. Brooklyn Fire Ins. Co.*, 44 N. Y. 42.

¹⁵ *Ely v. Ely*, 80 Ill. 532. See, also, *Grange Mill Co. v. Western Assur. Co.*, 118 Ill. 396; *Ames v. Richardson*, 29 Minn. 320; *Ridley*

Union Mortgage Clause — Standard Policies.

The insertion in a standard policy, issued to an owner of property and insuring his interest, of the clause known as the "union mortgage clause," whereby loss, if any, is payable to a mortgagee named "as his interest may appear," with a proviso that the mortgagee's interest shall not be invalidated by any act or neglect of the owner, is sometimes held to have the effect of making the designated mortgagee a party to the contract, at least to the extent of his insurable interest.¹⁶ But this is not the law. In such cases the contract is with the mortgagor and for the insurance of his interest. The owner is still the insured and the insurance is upon his property and not on the interest of the mortgagee. The latter is only conditionally designated to receive, to the extent of his interest if any is made to appear, the proceeds of the insurance, if any, due under the contract between the owner and the insurer; and the only proper function of this clause is to estop the insurer from asserting as against such mortgagee certain causes of forfeiture which might be available in defense of an action brought by the owner. A contract made in statutory form ought not to be interpreted in favor of either party.^{16a}

v. Ennis, 70 Ala. 463; Billings v. German Ins. Co., 34 Neb. 502, 52 N. W. 397; Heins v. Wicke, 102 Iowa, 396, 71 N. W. 345; Phenix Ins. Co. v. Omaha Loan & Trust Co., 41 Neb. 834, 25 L. R. A. 679; Wilcox v. Allen, 36 Mich. 160. And the mortgagee may maintain action in his own name: Hartford Fire Ins. Co. v. Olcott, 97 Ill. 449; Hastings v. Westchester Fire Ins. Co., 73 N. Y. 141.

¹⁶ Eddy v. London Assur. Corp., 143 N. Y. 311, 25 L. R. A. 686; Syndicate Ins. Co. v. Bohn (C. C. A.), 27 L. R. A. 614, 65 Fed. 165; Phenix Ins. Co. v. Omaha Loan & Trust Co., 41 Neb. 834; McKee v. Susquehanna Mut. Fire Ins. Co., 135 Pa. St. 544; National Bank of D. O. Mills & Co. v. Union Ins. Co., 88 Cal. 497.

^{16a} Ermentrout v. American Fire Ins. Co., 60 Minn. 420; Maxcy v. New Hampshire Fire Ins. Co., 54 Minn. 275; Chandos v. American Fire Ins. Co., 84 Wis. 184, 19 L. R. A. 321; Whitney v. Burkhardt, 60 N. E. 1; cases in note 12, ante.

Life.

A life insurance policy will be construed as far as possible in the nature of a will, and the courts will, as far as possible, construe it so as to give the proceeds of the policy to the party or class evidently intended by the parties to be designated as the payees or beneficiaries.¹⁷ The beneficiary of a policy has, upon its issuance, in the absence of any reservation to the contrary, an absolute and vested right in it, and to its proceeds, and of this right he cannot be divested without his assent.¹⁸ A joint tenancy is created in the beneficiaries, and where the proceeds, without any direction for division, are made payable to two persons named, on the death of one of them during the life of the insured, the other takes the whole amount of the benefit.¹⁹ One who has received the proceeds of a life insurance policy made payable to her, on her express agreement to hold it as trustee, cannot refuse to pay the money to the beneficiaries agreed upon, on the ground that they have no insurable interest in the life insured.²⁰ Where an association, in the absence of fraud, voluntarily issues a certificate, in which a beneficiary is designated by name, the beneficiary not being expressly prohibited from being so named, and there being no question of public policy involved, and thereafter, for a term of years, collects and receives assessments from the member, it will not be allowed to defeat a recovery on the certificate on the ground that the beneficiary could not be named as such, and that the certificate was *ultra vires*.²¹ When a person effects insurance on his own life,

¹⁷ Chartrand v. Brace, 16 Colo. 19, 12 L. R. A. 209.

¹⁸ Allis v. Ware, 28 Minn. 166. See post, "Right to Change Beneficiary;" Gould v. Emerson, 99 Mass. 154.

¹⁹ Farr v. Grand Lodge, A. O. U. W., 83 Wis. 446.

²⁰ Hurd v. Doty, 86 Wis. 1.

²¹ Bloomington Mut. Ben. Ass'n v. Blue, 120 Ill. 121, 11 N. E. 331;

and designates another as payee in the policy, without any fraud being practiced upon the insurer, the person named may maintain an action upon the policy without showing an insurable interest in the life of the insured.²² No one except the insurer can take advantage of the fact that the payee named in the policy is not within the class which, by the constitution of the insurer, is entitled to take the benefit.²³ A creditor has an insurable interest in the life of his debtor, and may insure it in an amount proportionate to the amount of the debt, and the expense of keeping the policy alive. But the amount of the policy must not be so great as to make the transaction a speculative or wagering one.²⁴

A recovery may be had although the statute of limitation has run against the debt since the insurance was effected.²⁵ A life policy, originally valid, does not cease to be so by the cessation of the payee's interest in the life insured. Thus a wife may recover upon a policy on the life of one who was her husband when it was issued, though she be afterwards divorced from him;²⁶ unless the contract provides to the contrary.²⁷ A policy of insurance procured by a man in favor of a woman

Gruber v. Grand Lodge, A. O. U. W., 79 Minn. 59, 81 N. W. 743; Gibson v. Imperial Council, O. of U. F., 168 Mass. 391, 47 N. E. 101.

²² Pacific Mut. Life Ins. Co. v. Williams, 79 Tex. 633; Vivar v. Supreme Lodge, K. of P., 52 N. J. Law, 455; Kentucky L. & A. Ins. Co. v. Hamilton (C. C. A.), 63 Fed. 93; Hill v. United Life Ins. Ass'n, 154 Pa. St. 29; Campbell v. New England Mut. Life Ins. Co., 98 Mass. 381.

²³ Johnson v. Knights of Honor, 53 Ark. 255, 8 L. R. A. 732.

²⁴ Ulrich v. Reinoehl, 143 Pa. St. 238, 13 L. R. A. 433; Rittler v. Smith, 70 Md. 261, 2 L. R. A. 844; Grant's Adm'rs v. Kline, 115 Pa. St. 618.

²⁵ Rawls v. American Life Ins. Co., 36 Barb. (N. Y.) 357. See ante, c. 9, "Insurable Interest."

²⁶ Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457.

²⁷ Tyler v. Odd Fellows Mut. Relief Ass'n, 145 Mass. 134, 13 N. E. 360.

living with him as his wife, and described in the policy as such, is payable to her instead of to his legal wife.²⁸ All the beneficiaries share equally in a policy of insurance payable to the widow and children of the insured.²⁹ A grandchild by a deceased child does not share in the proceeds of a policy for the benefit of the widow and the surviving children.³⁰ A posthumous child has no share in a policy payable to designated children of the insured.³¹ One whose life is insured for the benefit of his wife and children by a tontine policy which agrees to pay to them as "the assured," has neither the legal title to the policy, nor any right as trustee entitling him to its benefits at maturity, although he has always had possession and control of the policy, and paid the premiums, and the beneficiaries did not know of the existence of the insurance.³² A policy payable to the wife of the insured, with a proviso that in case of her death before that of her husband it should be payable to her children, vests an interest in the children, which cannot be destroyed by the assignment of the policy by the husband and wife.³³ A policy payable to a designated person, or her children or their guardian in case of her death before that of the assured, belongs to her grandchildren if her children die before the policy becomes payable.³⁴ If payable to the wife of the insured upon his death, and in case of her death to his children, the right to the policy vests in her if she survives him, and the proceeds be-

²⁸ *Overbeck v. Overbeck*, 155 Pa. St. 5. See, also, *Watson v. Centennial Mut. Life Ass'n*, 21 Fed. 698; *Story v. Williamsburgh Mut. Ben. Ass'n*, 95 N. Y. 476; *Bolton v. Bolton*, 73 Me. 299.

²⁹ *Taylor v. Hill*, 86 Wis. 99, 56 N. W. 738.

³⁰ *Small v. Jose*, 86 Me. 120.

³¹ *Spry v. Williams*, 82 Iowa, 61, 10 L. R. A. 863.

³² *New York Life Ins. Co. v. Ireland (Tex.)*, 14 L. R. A. 278.

³³ *Brown's Appeal*, 125 Pa. St. 303.

³⁴ *In re Conrad's Estate*, 89 Iowa, 396, 56 N. W. 535; *Walsh v. Mutual Life Ins. Co.*, 133 N. Y. 408.

come a part of her estate, though she died before collecting the same.³⁵

The term "children of the insured" includes offspring by different wives.³⁶ The word "heirs," used in a life insurance policy as descriptive of those entitled to the proceeds, where there is no context to modify or limit the ordinary signification of the word, means the parties who are by law entitled to the undivided property of the deceased.³⁷ The proceeds of a policy of insurance belong to the beneficiaries, and not to the estate of the deceased, when the policy is payable to the heirs at law of the insured.³⁸ A policy payable to the "legal representatives" of the insured, belongs to his heirs or next of kin, rather than to his executors or administrators.³⁹ The proceeds of a policy payable to one's exec-

³⁵ *Chartrand v. Brace*, 16 Colo. 19, 12 L. R. A. 209. See, also, on construction of rights of wife and children, *Hooker v. Sugg*, 102 N. C. 115, 3 L. R. A. 217; *Garner v. Germania Life Ins. Co.*, 110 N. Y. 266, 1 L. R. A. 256; *Hoffman v. Hoke*, 122 Pa. St. 377, 1 L. R. A. 229; *Ricker v. Charter Oak Life Ins. Co.*, 27 Minn. 193.

³⁶ *Koehler v. Centennial Mut. Life Ins. Co.*, 66 Iowa, 325. But only children common to both the assured and his designated wife are referred to in a policy payable to the wife and their children. *Evans v. Opperman*, 76 Tex. 293. See, also, as to "children," *Connecticut Mut. Life Ins. Co. v. Baldwin*, 15 R. I. 106; *Stowe v. Phinney*, 78 Me. 244; *McDermott v. Centennial Mut. Life Ass'n*, 24 Mo. App. 73; *Felix v. Grand Lodge, A. O. U. W.*, 31 Kan. 81; *Covenant Mut. Ben. Ass'n v. Hoffman*, 110 Ill. 603; *Conigland v. Smith*, 79 N. C. 303; *Lockwood v. Bishop*, 51 How. Prac. (N. Y.) 223; *Stigler's Ex'r v. Stigler*, 77 Va. 163.

³⁷ *Gauch v. St. Louis Mut. Life Ins. Co.*, 88 Ill. 251; *Hubbard v. Turner*, 93 Ga. 752; *Johnson v. Knights of Honor*, 53 Ark. 255, 8 L. R. A. 732; *Mullen v. Reed*, 64 Conn. 240, 24 L. R. A. 664; *Lyons v. Yerex*, 100 Mich. 214, 58 N. W. 1112.

³⁸ *Northwestern Masonic Aid Ass'n v. Jones*, 154 Pa. St. 99; *Mullen v. Reed*, 64 Conn. 240, 24 L. R. A. 664; *Cutchin v. Johnston*, 120 N. C. 51, 26 S. E. 698. As to "legal heirs," see *Brown v. Iowa Legion of Honor*, 107 Iowa, 439, 78 N. W. 73.

³⁹ *Schultz v. Citizens' Mut. Life Ins. Co.*, 59 Minn. 308, 61 N. W.

utors, administrators, or assigns, may be disposed of by will, as they form a part of his estate.⁴⁰ Where the express purpose of a beneficial association is to secure moneys to the family or heirs of the insured, upon his death, and a policy is issued payable to the wife of the insured, and her heirs, administrators, or assigns, and she dies before the insured, leaving no children, the heirs of the husband become entitled to the benefits, and not the heirs of the wife.⁴¹ Where a policy on a father's life is payable to a trustee, in trust for a minor child, the proceeds belong to the trustee, and not to the estate of the assured.⁴² A person has an insurable interest in his own life, and can insure it for the benefit of his heirs, or even for a stranger, and his executor cannot recover the proceeds of a policy procured by the insured himself, and payable to designated parties who did not have an insurable interest.⁴³

No Valid Designation of a Beneficiary Who Can Receive the Proceeds.

It sometimes happens, especially in the case of the issuance of certificates in fraternal or benevolent organizations, that there is no sufficient designation of a payee or beneficiary in the contract, or that the one designated is for some reason prohibited from collecting the moneys due on the certificate at maturity. The designation of the beneficiary in the certificate of a mutual benefit society is not always essential. It is a formality which neither goes to the substance of the contract

331. See, also, *Sulz v. Mutual Reserve Fund Life Ass'n*, 145 N. Y. 563, 28 L. R. A. 379; *Griswold v. Sawyer*, 125 N. Y. 411.

⁴⁰ *McCauley's Appeal*, 93 Pa. St. 102; *Kerman v. Howard*, 23 Wis. 108; *Williams v. Corson* (Tenn.), 5 Bigelow, Life & Acc. Rep. 524.

⁴¹ *Michigan Mut. Ben. Ass'n v. Rolfe*, 76 Mich. 146, 42 N. W. 1094.

⁴² *Cables v. Prescott*, 67 Me. 582.

⁴³ *Northwestern Masonic Aid Ass'n v. Jones*, 154 Pa. St. 99, 26 Atl. 253.

of membership, nor affects its express object. It may be waived, and if this is done those who might prove to be the heirs or legatees of the member at his death, cannot be heard to object because they have no vested right whatever in the benefit during the lifetime of the member.

A verbal designation of the beneficiary, made by the member after issuance of a certificate without any designation, may be accepted by the society as sufficient, and will be considered as an original designation, and not as a change of beneficiaries.⁴⁴ Unless the policy points out to whom the insurance money shall be paid in case the beneficiary die before the insured, the appointment of the beneficiary is revoked by his death.⁴⁵ It has been held that the proceeds of a policy, payable to the devisees of a member of a benevolent society, did not, upon the death of the member, form any part of his estate, nor are they recoverable by his executor or administrator;⁴⁶ and that where a policy, issued upon the life of a woman, is made payable to her children, and she dies before any children are born, her executor cannot maintain an action at law for the amount of the insurance.⁴⁷ But in the case of *Newman v. Covenant Mut. Ins. Ass'n*,⁴⁸ it is held that where a certificate was made payable to "the devisees of (the member), as designated in his last will and testament," and the member made no will, that the right to the insurance money descended to his heirs, the same as any other property or chose in action.

⁴⁴ *Hanson v. Minnesota S. R. Ass'n*, 59 Minn. 123.

⁴⁵ *Given v. Wisconsin Odd Fellows' Mut. Life Ins. Co.*, 71 Wis. 547, 37 N. W. 817; *Ryan v. Rothweller*, 50 Ohio St. 595.

⁴⁶ *Worley v. Northwestern Masonic Aid Ass'n*, 10 Fed. 227; *Hellenberg v. District No. 1, I. O. of B. B.*, 94 N. Y. 580.

⁴⁷ *McElwee v. New York Life Ins. Co.*, 47 Fed. 798.

⁴⁸ 76 Iowa, 61, 40 N. W. 89, citing *Smith v. Covenant Mut. Ben. Ass'n*, 24 Fed. 685; *Covenant Mut. Ben. Ass'n v. Sears*, 114 Ill. 113. See, also, *Fenn v. Lewis*, 10 Mo. App. 478, 81 Mo. 259; *In re Negus*, 27 Misc. Rep. 165, 58 N. Y. Supp. 377.

Where a member of a benefit society designates a creditor as the beneficiary in a certificate issued to him, in violation of the statute, the whole contract is not void, and the executor of the member's estate is entitled to the money due on the certificate, to be held by him in trust for the benefit of those who, at the time the contract was made, were entitled to be named as beneficiaries.⁴⁹ An invalid or inoperative attempt to change a beneficiary will not destroy the rights of the beneficiary.⁵⁰ A beneficiary in an insurance policy, who murders the insured, forfeits all rights under the policy,⁵¹ but the liability of the company is not thereby terminated. The benefits revert to, and become a part of the estate of the assured, and his administrator can recover them, for the benefit of those who would have been entitled to the insurance, had no beneficiary been designated.⁵²

ASSIGNMENT.

§ 227. A fire insurance policy is not, before loss, assignable without the consent of the insurer.

§ 228. A life insurance policy is usually considered to be assignable, unless an assignment is expressly prohibited by the terms of the policy.

⁴⁹ Supreme Council, A. L. of H., v. Perry, 140 Mass. 580, 5 N. E. 634; Clarke v. Schwarzenberg, 162 Mass. 98, 38 N. E. 17.

⁵⁰ Elsey v. Odd Fellows' Mut. Relief Ass'n, 142 Mass. 224, 7 N. E. 844; Grace v. Northwestern Mut. Relief Ass'n, 87 Wis. 562, 58 N. W. 1041.

⁵¹ New York Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591; Schreiner v. High Court, C. O. of F., 35 Ill. App. 576.

⁵² Shea v. Massachusetts Ben. Ass'n, 160 Mass. 289; Palmer v. Welch, 132 Ill. 141; Schmidt v. Northern Life Ass'n (Iowa), 83 N. W. 803; Schonfield v. Turner, 75 Tex. 324, 7 L. R. A. 189. As to designation of beneficiary not entitled to proceeds, see, also, Beard v. Sharp, 100 Ky. 606; Love v. Clune, 24 Colo. 237, 50 Pac. 34; Northwestern Masonic Aid Ass'n v. Jones, 154 Pa. St. 99; Hurd v. Doty, 86 Wis. 1; Peek's Ex'r v. Peek's Ex'r, 101 Ky. 423; Mayher v. Manhattan Life Ins. Co., 87 Tex. 169.

§ 229. The effect of an assignment of a policy, with the consent of the insured, is to create a new contract between the insurer and the assignee.

§ 230. The rights of a payee after maturity of a policy are assignable.

Assignment of Fire Insurance Policy.

Policies of fire insurance are not, in their nature, assignable, nor is the interest in them ever intended to be transferable from one to another, without the consent of the insurer. They are not insurances of the specific thing mentioned to be insured, and do not attach to the property, or in any manner follow the same as incident thereto, by any conveyance or assignment. They are only special agreements to indemnify the assured mentioned therein, against such loss or damage as he may sustain from the peril specified.⁵³ When insured property is transferred, and a policy thereon assigned to the purchaser, with the assent of the insurer, the purchaser becomes the insured, and his rights are unaffected by any acts of forfeiture, or default of the assignor, occurring before the assignment. A new relation is created between the insurer and the assignee, just as if the original policy was surrendered, and a new one issued.⁵⁴ By consenting to the transfer and assignment of the policy, the insurer waives all defenses to the validity of the policy, at the time the consent is given, and validates the policy, even if it had before been void.⁵⁵

⁵³ *New v. German Ins. Co.*, 5 Ind. App. 82, 31 N. E. 475; *Williams v. Lilley*, 67 Conn. 50, 37 L. R. A. 150; *White v. Robbins*, 21 Minn. 370; *Carpenter v. Providence W. Ins. Co.*, 16 Pet. (U. S.) 495; *Fogg v. Middlesex Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 345.

⁵⁴ *Continental Ins. Co. v. Munns*, 120 Ind. 30, 22 N. E. 78; *Bullman v. North British & M. Ins. Co.*, 159 Mass. 122, 34 N. E. 169; *Hall v. Niagara Fire Ins. Co.*, 93 Mich. 184.

⁵⁵ *Rines v. German Ins. Co.*, 78 Minn. 46, 80 N. W. 839.

Assignment of Life Insurance Policy.

It is well settled that a policy of life insurance, where the policy contains no provision to the contrary, is assignable as any other chose in action, at least provided the assignee has an insurable interest in the life of the insured.⁵⁶ And it is often held that if the policy be taken out in good faith, and not as a cover for a wager, it may be assigned to one who has no insurable interest in the life of the insured.⁵⁷ The weight of authority cannot be said to be in favor of this rule, unless the insurer expressly consents to the assignment.⁵⁸ A condition of a policy that no assignment shall be valid unless made in writing, indorsed thereon, and unless a copy of the assignment be given to the company, is for the benefit of the insurer alone.⁵⁹

What is an Assignment.

A pledge of a policy as collateral security, is not an assignment within the terms of a prohibition of the policy against an assignment.⁶⁰ A parol assignment of the policy, accom-

⁵⁶ *Rittler v. Smith*, 70 Md. 261, 2 L. R. A. 844; *Milner v. Bowman*, 119 Ind. 448; *Hogue v. Minnesota Packing & Provision Co.*, 59 Minn. 39; *Robinson v. Hurst*, 78 Md. 59, 20 L. R. A. 761; *Prudential Ins. Co. v. Liersch*, 122 Mich. 436, 81 N. W. 258; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457.

⁵⁷ *Valton v. National Fund Life Assur. Co.*, 20 N. Y. 32; *Dixon v. National Life Ins. Co.*, 168 Mass. 48, 46 N. E. 430; *Eckel v. Renner*, 41 Ohio St. 232; *Clark v. Allen*, 11 R. I. 439; *Bursinger v. Bank of Watertown*, 67 Wis. 75; *Smith v. National Ben. Soc.*, 123 N. Y. 85.

⁵⁸ *Warnock v. Davis*, 104 U. S. 775; *Missouri Valley Life Ins. Co. v. McCrum*, 36 Kan. 146; *Stevens v. Warren*, 101 Mass. 564; *Downey v. Hoffer*, 110 Pa. St. 109; *Alabama Gold Life Ins. Co. v. Mobile Mut. Ins. Co.*, 81 Ala. 329; *Schlamp v. Berner's Adm'r* (Ky.), 51 S. W. 312. See ante, c. 9, "Insurable Interest," notes 52-56.

⁵⁹ *Hogue v. Minnesota Packing & Provision Co.*, 59 Minn. 39.

⁶⁰ *Griffey v. New York Cent. Ins. Co.*, 100 N. Y. 417; *Mahr v. Bartlett*, 53 Hun (N. Y.), 388.

panied by delivery, is sufficient.⁶¹ The validity of the assignment must be determined by the law of the place where it is made.⁶²

Assignment of Policy After Maturity.

An assignment of a policy, and the right to recover upon it, after maturity, is valid, regardless of the conditions of the policy. The assignee succeeds to the right of the assignor, and his claim is subject to any defenses which might have been asserted against the assignor.⁶³ An order on the insurer for the amount of the loss, will constitute an equitable assignment

⁶¹ Chapman v. McIlwrath, 77 Mo. 38; Hogue v. Minnesota Packing & Provision Co., 59 Minn. 39.

⁶² Mutual Life Ins. Co. v. Allen, 138 Mass. 24; Connecticut Mut. Life Ins. Co. v. Westervelt, 52 Conn. 586. See, also, as to assignment, Briggs v. Earl, 139 Mass. 473; Brick v. Campbell, 122 N. Y. 337; Brown v. Equitable Life Assur. Soc., 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968; Thompson v. Phenix Ins. Co., 136 U. S. 287 (change of receivers); Forest City Ins. Co. v. Hardesty, 182 Ill. 39, 55 N. E. 139; Germania Fire Ins. Co. v. Home Ins. Co., 144 N. Y. 195 (taking in a partner); Trabue v. Dwelling House Ins. Co., 121 Mo. 75, 23 L. R. A. 719; Perry v. Lorillard Fire Ins. Co., 6 Lans. 201, 61 N. Y. 214; Dube v. Mascoma Mut. Fire Ins. Co., 64 N. H. 527 (assignment in bankruptcy); Westchester Fire Ins. Co. v. Dodge, 44 Mich. 420 (death of insured); Georgia Home Ins. Co. v. Kinnier's Adm'r, 28 Grat. (Va.) 88; Brown v. Cotton & Woolen Manuf'rs Mut. Ins. Co., 156 Mass. 587 (descent of property to heirs); Richardson's Adm'r v. German Ins. Co., 89 Ky. 571, 8 L. R. A. 800 (death of insured); Roby v. American Cent. Ins. Co., 120 N. Y. 510 (dissolution of firm); McNally v. Phoenix Ins. Co., 137 N. Y. 389 (appointment of receiver). See, also, Keeney v. Home Ins. Co., 71 N. Y. 396; Carey v. German American Ins. Co., 84 Wis. 80; Orr v. Citizens' Fire Ins. Co., 159 Ill. 187, 43 N. E. 867.

⁶³ Nease v. Aetna Ins. Co., 32 W. Va. 283; Bennett v. Maryland Fire Ins. Co., 14 Blatchf. 422, Fed. Cas. No. 1,321; West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289; Bonefaut v. American Fire Ins. Co., 76 Mich. 654; Hall v. Dorchester Mut. Fire Ins. Co., 111 Mass. 53; Fenton v. Fidelity & Casualty Co., 36 Or. 283, 56 Pac. 1096, 48 L. R. A. 770; Spare v. Home Mut. Ins. Co., 17 Fed. 568; Imperial Fire Ins. Co. v. Dunham, 117 Pa. St. 460.

to the extent of the amount mentioned in the order;⁶⁴ and a claim for damages against an insurer, because of its failure to deliver a paid-up policy, is assignable.⁶⁵ Courts will recognize an equitable assignment of a claim to the proceeds of a policy, and enforce the rights of the assignee.⁶⁶

Pledge of Policy.

A pledge of a policy is not an assignment of it.⁶⁷ It may be effected by mere manual delivery of the policy, without any writing,⁶⁸ but delivery of the policy to the pledgee is essential.⁶⁹ The deposit of a policy of insurance with a creditor of the assured as security for a debt, gives the creditor a lien on the proceeds of the policy, which lien is binding upon the insured, the insurer, and all persons who, without notice of the lien, take an interest in the policy from the insured.⁷⁰ A pledgee may recover the full amount due although a portion of his debt is not matured, and the amount due on the policy exceeds the entire debt.⁷¹

RIGHT TO CHANGE BENEFICIARY.

§ 231. In the absence of a provision reserving the right to designate a new beneficiary, the rule is that a beneficiary in a life insurance policy acquires, upon the execution and delivery of the policy, a vested right and interest, of which he cannot be deprived without his consent.

⁶⁴ Union Ins. Co. v. Glover, 9 Fed. 529; Aultman v. McConnell, 34 Fed. 724.

⁶⁵ Missouri Valley Life Ins. Co. v. Kelso, 16 Kan. 481.

⁶⁶ In re Wittenberg Veneer & Panel Co., 108 Fed. 597.

⁶⁷ Griffey v. New York Cent. Ins. Co., 100 N. Y. 417; Mahr v. Bartlett, 53 Hun (N. Y.), 388.

⁶⁸ Hogue v. Minnesota Packing & Provision Co., 59 Minn. 39.

⁶⁹ In re Wittenberg Veneer & Panel Co., 108 Fed. 597.

⁷⁰ Ellis v. Kreutzinger, 27 Mo. 311, 72 Am. Dec. 270.

⁷¹ Hale v. Life Ind. & Inv. Co., 65 Minn. 548, 68 N. W. 182. See, also, Brown v. Equitable Life Assur. Soc., 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968.

Whether a beneficiary acquires a vested interest in the moneys to be paid upon the death of the insured, must be determined by the terms and conditions of the contract of insurance. The rule is that in an ordinary life insurance policy, made payable to a person named, the rights of the beneficiary are vested when the policy is issued, and that these rights cannot be divested without the assent of the beneficiary himself.⁷² But policies may, and often do, reserve such a control to the insured himself as to leave in the beneficiary, until the death of the insured, nothing but a contingent interest.

It is often said that the certificates of beneficial and fraternal associations differ from the ordinary life policies in this, that the beneficiaries in the former have only a contingent interest until the death of the insured, and that their interests do not become vested until the death has occurred without a change of beneficiaries being made. But this distinction would seem to rest more upon the terms of the contract, than upon any essential difference in the nature of the contracts of insurance.⁷³ Where the contract gives the in-

⁷² *Ricker v. Charter Oak Life Ins. Co.*, 27 Minn. 195; *In re Kugler*, 23 La. Ann. 455; *Pingrey v. National Life Ins. Co.*, 144 Mass. 374; *Matlack v. Mutual Life Ins. Co.*, 180 Pa. St. 360, 36 Atl. 1082; *Wilmaser v. Continental Life Ins. Co.*, 66 Iowa, 417; *Ferdon v. Canfield*, 104 N. Y. 143.

⁷³ *Marsh v. Supreme Council, A. L. of H.*, 149 Mass. 515; *Supreme Council, C. K. of A., v. Franke*, 137 Ill. 118; *Jory v. Supreme Council, A. L. of H.*, 105 Cal. 20, 45 Am. St. Rep. 17, 26 L. R. A. 733; *Kline v. National Ben. Ass'n*, 111 Ind. 462; *Chartrand v. Brace*, 16 Colo. 19, 12 L. R. A. 209; *Knights of Honor v. Watson*, 64 N. H. 517; *Gutterson v. Gutterson*, 50 Minn. 278, 52 N. W. 530; *Simcoke v. Grand Lodge, A. O. U. W.*, 84 Iowa, 383, 15 L. R. A. 114. See, also, *Manning v. Ancient Order of U. W.*, 86 Ky. 139, 9 Am. St. Rep. 270; *Block v. Valley Mut. Ins. Ass'n*, 52 Ark. 201, 20 Am. St. Rep. 166; *Metropolitan Life Ins. Co. v. O'Brien*, 92 Mich. 584, 52 N. W. 1012; *Johnson v. Van Epps*, 14 Bradw. (Ill.) 201, 110 Ill. 551

sured the right to change beneficiaries, and points out the method which must be pursued, this method is fixed and binding upon the insured, and he has no right to effect a change of beneficiaries in any other manner.⁷⁴ But it has been held in the absence of any provisions in the contract providing expressly for a change of beneficiaries, or prohibiting such change, that, by reason of the character and purposes of fraternal and beneficial associations, it should be held that the power to change the beneficiary is vested in the member during his lifetime.⁷⁵ Where an attempt to change a beneficiary fails, a previous designation of the beneficiary remains in force if valid.⁷⁶ A change of beneficiary, procured by fraud and undue influence, is ineffectual to deprive the beneficiary of his rights.⁷⁷

RIGHTS OF CREDITORS.

§ 232. Whether or not, in a given case, creditors of an insured are entitled to recover the proceeds of a life insurance policy, paid for by moneys invested in fraud of creditors, depends upon the law of the forum.

The creditors of an insured can reach the proceeds of a policy after they become a claim in favor of the debtor against the company.

⁷⁴ *Holland v. Taylor*, 111 Ind. 121; *Stephenson v. Stephenson*, 64 Iowa, 534, 21 N. W. 19; *Supreme Council, A. L. of H., v. Smith*, 45 N. J. Eq. 466, 17 Atl. 770; *Supreme Lodge, K. of H., v. Nairn*, 60 Mich. 44, 26 N. W. 826; *Sanborn v. Black*, 67 N. H. 537, 35 Atl. 942.

⁷⁵ *Woodruff v. Tilman*, 112 Mich. 188, 70 N. W. 420; *Carpenter v. Knapp*, 101 Iowa, 712, 70 N. W. 764; *Fischer v. American Legion of Honor*, 168 Pa. St. 279, 31 Atl. 1089; *Voigt v. Kersten*, 164 Ill. 314, 45 N. E. 545.

⁷⁶ *Elsev v. Odd Fellows' Mut. Relief Ass'n*, 142 Mass. 224, 7 N. E. 844; *Smith v. Boston & Maine R. R. Ass'n*, 168 Mass. 213, 46 N. E. 626; *Quinn v. Supreme Council, C. K.*, 99 Tenn. 80, 41 S. W. 343. As to validity of change, see *Heasley v. Heasley*, 191 Pa. St. 539, 43 Atl. 364; *Sanborn v. Black*, 67 N. H. 537, 35 Atl. 942; 45 Cent. Law J. 491.

⁷⁷ *Cason v. Owens*, 100 Ga. 142, 28 S. E. 75.

It follows, from what has already been said concerning the rights to assign the proceeds of a policy after maturity, that the creditors of the party to whom the proceeds belong are entitled to appropriate the same in satisfaction of their debts, unless such proceeds are exempt from the claims of creditors.⁷⁸ Where an insured has violated the conditions of a policy his creditors have no better right to compel payment of the policy under a process of garnishment against the insured, than the insured himself has.⁷⁹ The proceeds of a policy, covering the interest of a mortgagee during the year of redemption, where the policy is procured and paid for by the mortgagor, belong to the mortgagee personally, and do not enure to the benefit of the owner of the equity, where no redemption is made.⁸⁰ Where a policy on the life of an insured is payable to a designated creditor if living, if not, then to the representatives of the assured, the creditor must prove the existence and amount of his debt, in order to recover upon the policy.⁸¹ Creditors cannot claim the proceeds of a policy issued on the life of a debtor for the benefit of his family, without showing that the premiums were paid in fraud of their rights.⁸² The proceeds of a policy payable to the assured or his order,⁸³ or to his heirs, executors, administrators

⁷⁸ See ante, "Assignment of Policy after Maturity."

⁷⁹ *Phenix Ins. Co. v. Willis*, 70 Tex. 12; *Bernheim v. Beer*, 56 Miss. 149; *McLean v. Hess*, 106 Ind. 555.

⁸⁰ *Carlson v. Presbyterian Board of Relief*, 67 Minn. 436.

⁸¹ *Crotty v. Union Mut. Life Ins. Co.*, 144 U. S. 621. See, also, *Shaffer v. Spangler*, 144 Pa. St. 223, 22 Atl. 865; *Ulrich v. Reinoehl*, 143 Pa. St. 238, 22 Atl. 862.

⁸² *Pence v. Makepeace*, 65 Ind. 345; *Weber v. Paxton*, 48 Ohio St. 266; *Mutual Life Ins. Co. v. Sandfelder*, 9 Mo. App. 285; *Holmes v. Gilman*, 138 N. Y. 369, 20 L. R. A. 566; *Central Bank of Washington v. Hume*, 128 U. S. 195.

⁸³ *White v. Smith*, 2 Willson, Civ. Cas. Ct. App. (Tex.) 349.

or assigns,⁸⁴ or to the legal representatives of the assured,⁸⁵ form a part of the estate of the insured, and are for the benefit of his creditors. Otherwise if the policy is payable to his heirs.⁸⁶

Where an assured takes out a policy payable to his wife, and pays all the premiums from trust moneys, the *cestui que trust* is entitled to the whole insurance fund. Where, however, only a part of the premiums has been paid with trust moneys, the *cestui que trust* is entitled to such a proportionate share of the proceeds as the amount of his money, used in payment of premiums, bears to the money paid from other sources.⁸⁷ A man must be just before he is generous. A husband cannot settle insurance, or money, or property in any form, upon his wife or friends, in fraud of creditors. If he attempts to do so the creditors are entitled to the aid of the courts to reach property so settled, in whatever form it is found.⁸⁸

In *Central Bank of Washington v. Hume*,⁸⁹ it was held by the supreme court of the United States, that there was an obvious distinction between the transfer of a policy taken out by a debtor upon his own life, and payable to himself and his

⁸⁴ *Rawson v. Jones*, 52 Ga. 458; *Burton v. Farinholt*, 86 N. C. 269.

⁸⁵ *People v. Phelps*, 78 Ill. 147.

⁸⁶ *Mullins v. Thompson*, 51 Tex. 7; *Northwestern Masonic Aid Ass'n v. Jones*, 154 Pa. St. 99, 26 Atl. 253.

⁸⁷ *Dayton v. H. B. Claffin Co.*, 19 App. Div. (N. Y.) 121. See, also, *Pullis v. Robison*, 73 Mo. 201.

⁸⁸ *Merchants' & Miners' Transp. Co. v. Borland*, 53 N. J. Eq. 282, 31 Atl. 275.

⁸⁹ 128 U. S. 195. See, also, *Elliott's Ex'rs Appeal*, 50 Pa. St. 75; *McCutcheon's Appeal*, 99 Pa. St. 137; *Aetna Nat. Bank v. United States Life Ins. Co.*, 24 Fed. 770; *Pence v. Makepeace*, 65 Ind. 345; *Succession of Hearing*, 26 La. Ann. 326; *Thompson v. Cundiff*, 11 Bush (Ky.), 567; *Thompson v. American Tontine L. & S. Ins. Co.*, 46 N. Y. 675; *Emerson v. Bemis*, 69 Ill. 541.

legal representatives, and the obtaining of a policy by a person upon the insurable interest of his wife and children in his life, the policy being payable to them; and that the creditors of a debtor husband are not entitled to recover the premiums paid by him on policies issued on his own life for the benefit of and payable to his wife and children, where there is no evidence from which a fraudulent intent on the part of the latter or the insurance companies to put the property beyond the reach of the creditors can be inferred.

The case of *Stokes v. Amerman*⁹⁰ presents the difficult and

⁹⁰ 121 N. Y. 337, 24 N. E. 819. See, also, *Tompkins v. Levy*, 87 Ala. 263; *Leonard v. Clinton*, 26 Hun (N. Y.), 288; *Cotton v. Vansittart*, 20 Grant Ch. (Up. Can.) 244; *Holmes v. Gilman*, 138 N. Y. 369; *Roberts v. Winton*, 100 Tenn. 484, 41 L. R. A. 275; *Bartlett v. Goodrich*, 153 N. Y. 421, 47 N. E. 794; *Hendrie & B. Mfg. Co. v. Platt*, 13 Colo. App. 15, 56 Pac. 209; *Andrews v. Union Cent. Life Ins. Co.*, 92 Tex. 584, 50 S. W. 572; *Lehman v. Gunn*, 124 Ala. 213, 51 L. R. A. 112; *Sternberg v. Levy*, 159 Mo. 617, 60 S. W. 1114, 30 Ins. Law J. 506; *Northwestern Masonic Aid Ass'n v. Jones*, 154 Pa. St. 99, 26 Atl. 253.

In *Hendrie & B. Mfg. Co. v. Platt*, 13 Colo. App. 15, 56 Pac. 209, it was held that a creditor has no legal right to enforce a claim to the payment of his debt against the proceeds of insurance upon the life of the deceased debtor for the benefit of his wife and children, in the absence of fraudulent intent, unless it be to the extent of the premiums paid by the debtor subsequent to the incurring of the debt sued on and during his insolvency, if he was insolvent. And the court said: "By the authorities which have adjudicated the question independent of statute, we find three distinct positions announced: First. That, in the absence of actual fraud, the fund derived from insurance upon his own life by an insolvent debtor in favor of his wife or child or children, dependent upon him, cannot be reached by his creditors, and made subject to the payment of his debts, except, possibly, in certain contingencies, which we will hereafter discuss, the amount of the premiums paid by the insolvent debtor during insolvency. In support of this doctrine, either in whole or in part, are *Central Nat. Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41; *Appeal of Elliott's Ex'rs*, 50 Pa. St. 75; *Aetna Nat. Bank v. United States Life Ins. Co.*, 24 Fed. 770; *Central Nat. Bank v. Hume*, 3 Mackey, D. C. 360; *In re Anderson's Estate*, 85 Pa. St. 202;

novel question of the right of a judgment creditor to maintain an action to subject a policy to his claims, before the policy

Pence v. Makepeace, 65 Ind. 345; Pinneo v. Goodspeed, 120 Ill. 536, 12 N. E. 196; State v. Tomlinson, 16 Ind. App. 672-675, 45 N. E. 1120; Holmes v. Gilman, 138 N. Y. 369, 34 N. E. 205; Stigler's Ex'r v. Stigler, 77 Va. 163, 2 Bigelow, Frauds, p. 129. To this effect in principle are, also, Forrester v. Gill, 11 Colo. App. 410, 53 Pac. 230; McLean v. Hess, 106 Ind. 555, 7 N. E. 567. Another doctrine, supported by some authority, is that the procurement of such insurance by an insolvent is a voluntary conveyance or gift, which is void as to existing creditors, though no fraud may have been intended, and that the whole of the insurance would be subject to the debts of the insured. The principal authorities in support of this doctrine to which we have been cited seem to be Fearn v. Ward, 80 Ala. 555, 2 So. 114; Merchants' & Miners' Transp. Co. v. Borland, 53 N. J. Eq. 282, 31 Atl. 272; and Stokes v. Coffey, 8 Bush (Ky.), 553. Another line of authorities holds that in such cases the amount of the premiums paid by the insolvent, and that alone, of the proceeds, can be reached by his creditors. We think that the weight of authority is in favor of the doctrine announced by the first line of authorities, and that it is better sustained upon reason and upon principle. The reasoning by which the courts holding to this view support their conclusions commends itself most highly to our judgment. In the first place, it is undoubtedly the law, as held almost if not quite universally, that the policy is the contract of insurance, and that, the moment it is issued, its ownership vests in the beneficiary. The applicant for it, and he who paid the premium which secured it, cannot thereafter change, assign, alienate, or encumber it, or any rights to be secured under it upon compliance with its provisions. He cannot even defeat it by a refusal to pay the subsequent premiums required, if the beneficiary or any person for her pays them. The contract is between the insurance company and the beneficiary. To this effect are the authorities above cited, and also numerous others to which reference might be made, including the following: Wilburn v. Wilburn, 83 Ind. 55; Yore v. Booth, 110 Cal. 238, 42 Pac. 808; Ricker v. Charter Oak Life Ins. Co., 27 Minn. 193, 6 N. W. 771; Bliss, Ins. § 318. The payments of subsequent premiums do not create new contracts, nor, strictly speaking, do they constitute renewals of the insurance contract. They are simply the fulfillment of conditions required by the original contract, a failure to comply with which would work a forfeiture. Besides, the contract is based upon and its fruits finally realized, if at all, because of the insurable interest of the beneficiary in the life of the assured."

becomes due. The court says: "Contracts for the future payment of money, depending upon conditions to be performed, are not, for any reason growing out of their uncertain character, exempt from the claims of creditors. Unmatured life insurance policies have been treated by the courts as possessing a present value in the distribution of the assets of insolvent insurance companies, * * * and we perceive no reason why the interest of a judgment creditor in such a contract, arising under the statute permitting a wife to insure her husband's life, may not be declared and protected by the courts. The wife cannot be compelled to assign the policy, nor can her interest therein, represented by premiums to the extent of \$500, be affected by any proceedings on the part of such creditor. [The New York statute allows an exempted appropriation by a creditor of \$500, for the purchase of life insurance.] But the interest of a creditor, which attaches to a contract of life insurance, in virtue of the statute, and by reason of the fact of payment by the judgment debtor of premiums in excess of \$500, may be declared by a court of equity, and impressed upon the contract, in an action where the company issuing the policy, and all persons interested therein are parties, though the money secured thereby is not due."

From the authorities cited a fair inference would seem to be that a man is entitled to make any provision he chooses for the securing of insurance on his own life payable upon his death to his wife and children, provided he does not thereby commit a fraud upon his creditors; that whether the payment of a given amount for the procurement of such insurance payable to his wife and children constitutes a fraud upon the rights of his creditors, and what if any right the creditors have to reach the proceeds of a policy so bought, must depend upon the circumstances of a given case, and the law of the state where the transactions were had.

Right of Assignee in Insolvency.

An assignee in bankruptcy has no insurable interest in the life of the bankrupt, at least after his discharge. Upon a policy on the life of a bankrupt, payable at his death to his executors, administrators, or assigns, and requiring the payment of an annual premium during the life of the bankrupt, the only beneficial interest which passes to the assignee in bankruptcy is its surrender value, or net reserve at the time of the bankruptcy. If the policy has no cash surrender value, and no value for any purpose except the contingency of its becoming valuable at the death of the bankrupt if the premiums are kept up, it does not pass to the trustee as an asset of the estate of the bankrupt.⁹¹ If the policy provides that if the assured should survive until a stated time, then a stipulated sum should be paid to him, the rights of the insured in the policy pass to his assignee in insolvency, under an assignment made about the date of the maturity of the policy.⁹² The rights of the bankrupt in an endowment policy upon his own life, pass to his assignee;⁹³ and the proceeds of a policy maturing during the term of office of the assignee, belong to him rather than to the creditors.⁹⁴ An assignment by a debtor

⁹¹ *In re Steele*, 98 Fed. 78; *Morris v. Dodd*, 110 Ga. 606, 50 L. R. A. 33; *In re Buelow*, 98 Fed. 86; *In re McKinney*, 15 Fed. 535. See, also, *Larue's Assignee v. Larue*, 96 Ky. 326; *Barbour v. Connecticut Mut. Life Ins. Co.*, 61 Conn. 240, 23 Atl. 154; *Burton v. Farinholt*, 86 N. C. 260; *Anthracite Ins. Co. v. Sears*, 109 Mass. 383; *Day v. New England Life Ins. Co.*, 111 Pa. St. 507, 56 Am. Rep. 297, 4 Atl. 748; *Hurlbut v. Hurlbut*, 49 Hun, 189, 1 N. Y. Supp. 854; *Pace v. Pace*, 13 Fla. 438.

⁹² *Bassett v. Parsons*, 140 Mass. 169, 3 N. E. 547; *Pierce v. Charter Oak Life Ins. Co.*, 138 Mass. 151.

⁹³ *Brigham v. Home Life Ins. Co.*, 131 Mass. 319.

⁹⁴ *Rhode Island Nat. Bank v. Chase*, 16 R. I. 37. No question seems to have been raised as to whether the deceased's interest in the policy passed by deed of assignment.

of all his property, under the statute, for the benefit of his creditors, operates as an assignment of, and renders void a fire insurance policy held by him, which contains a provision that it shall be void if assigned without the consent of the company.⁹⁵

⁹⁵ Dube v. Mascoma Mut. Fire Ins. Co., 64 N. H. 527; Adams v. Rockingham Mut. Fire Ins. Co., 29 Me. 292.

CHAPTER XVII.

SUBROGATION.

§ 233. Definition and Explanation.

234. Right of Insurer.

DEFINITION AND EXPLANATION.

§ 233. Subrogation is the substitution of one person in place of another, whether as a creditor or as the possessor of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and all his rights, remedies, or securities connected therewith.

Subrogation, as the term is used in the law of insurance, consists in the substitution of the insurer in the place of the insured, in relation to the rights of the latter to recover against another on account of the subject matter of the insurance.

In fire insurance, as in marine insurance, the insurer, upon paying to the assured the amount of a loss on the property insured, is subrogated, in a corresponding amount, to the assured's right of action against any other person responsible for the loss. But the right of the insurer against such other person does not rest upon any relation of contract, or privity between them. It arises out of the nature of the contract of insurance, as a contract of indemnity, and is derived from the assured alone, and can be enforced in his right only. By the strict rules of the common law it must be asserted in the name of the insured. In a court of equity, or under some state codes, it may be asserted by the insurer in his own name. But in any form of remedy, the insurer can take nothing by subrogation but the rights which accrued to the insured, and

if no right of action against another accrued to the insured, none passes to the insurer.¹

If the assured first applies to the tort-feasor, whose negligence caused his loss, and receives damages from him, that diminishes his loss *pro tanto*. The liability of the tort-feasor is, in legal effect, first and principal, and that of the insurer secondary, not only in order of time but in order of ultimate liability. The assured may first apply to whichever he pleases. If he first applies to the tort-feasor, who pays him, he thereby diminishes his loss, and his claim against the insurer is only for the balance. If he first applies to the insurer, and receives his whole loss, he holds the claim against the tort-feasor in trust for the insurer.² Where a policy provides that the insured shall, on receiving payment, assign to the insurer his claim against one causing the loss, the covenant of the insurer to pay, and of the insured to assign, are dependent, and performance by one cannot be compelled without performance or an offer to perform by the other. A release, given by the insured to the one whose negligence caused the loss, is a defense to an action on the policy.³ And if the insured settles with the one responsible for the loss, and afterwards, concealing that fact from the insurer, receives from it payment under its policy, the latter may recover from the former the payments so made. It is a payment made in ignorance of circumstances with which the receiver is ac-

¹ *Platt v. Richmond Y. R. & C. R. Co.*, 108 N. Y. 358; *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508, 52 Am. Rep. 728; *Phoenix Ins. Co. v. Erie & W. Transportation Co.*, 117 U. S. 312; *Kernochan v. New York Bowery Fire Ins. Co.*, 17 N. Y. 428; *Anderson v. Miller*, 96 Tenn. 35, 31 L. R. A. 604; 54 Cent. L. J. 51.

² *Hart v. Western R. Corp.*, 13 Metc. (Mass.) 99.

³ *Niagara Fire Ins. Co. v. Fidelity T. & T. Co.*, 123 Pa. St. 516, 16 Atl. 790; *Chickasaw County Farmers' Mut. Fire Ins. Co. v. Weller*, 98 Iowa, 731, 68 N. W. 443.

quainted, but does not disclose, and which, if disclosed, would prevent the payment, and the suppression of facts is therefore fraudulent.⁴

RIGHT OF INSURER.

§ 234. The right of the insurer to subrogation exists independent of contract.

An insurer who has paid the loss for which another, because of his negligence, was primarily liable, stands in the position of a surety, and becomes subrogated to the rights of the insured as against such other to the extent of the amount paid.

An insurer which has been compelled to pay the owner for property destroyed by fire, has a right of action against the one who wrongfully caused the loss, without any express assignment of such right by the assured, and under most codes may sue in its own name.⁵ If the insurer pays to the owner the money due him on the contract of insurance, the owner cannot properly thereafter sue the tort-feasor for the loss of the property without making the insurer a party plaintiff, or, in case it refuses, a party defendant.⁶ And a release or discharge by the owner, of the one whose negligence caused the loss, is a release of the insurer. The assured cannot recover from both for the entire loss, and if, after recovery from the insurer, the

⁴Chickasaw County Farmers' Mut. Fire Ins. Co. v. Weller, 93 Iowa, 731, 68 N. W. 443. See, also, Mathews v. St. Louis & S. F. Ry. Co., 121 Mo. 298, 25 L. R. A. 161; Chicago & A. R. Co. v. Glenny, 175 Ill. 238, 51 N. E. 896; Fidelity & Casualty Co. v. Eickhoff, 63 Minn. 170, 65 N. W. 351, 30 L. R. A. 586; Leavitt v. Canadian Pacific Ry. Co., 90 Me. 153, 38 L. R. A. 152; Hare v. Headley, 52 N. J. Eq. 496, 35 Atl. 445.

⁵Connecticut Fire Ins. Co. v. Erie Ry. Co., 73 N. Y. 399; Hustisford Farmers' Mut. Ins. Co. v. Chicago, M. & St. P. Ry. Co., 66 Wis. 58; Sims v. Mutual Fire Ins. Co., 101 Wis. 586, 77 N. W. 908.

⁶Wunderlich v. Chicago & N. W. Ry. Co., 93 Wis. 132, 66 N. W. 1144; Home Mut. Ins. Co. v. Oregon Ry. & Nav. Co., 20 Or. 569, 26 Pac. 857; Phenix Ins. Co. v. Pennsylvania R. Co., 134 Ind. 215, 33 N. E. 970.

insured receives damages from the other, he holds the damages so received in trust for the insurer, who may recover them from him by a suit in equity.⁷

Rights of Carriers to Subrogation.

Since the right by way of subrogation of an insurer, on payment of a loss, is only that right which the insured has, it follows that when a bill of lading provides that the carrier, when liable for loss, shall have the full benefit of any insurance that may have been effected upon the goods, this provision is valid between the carrier and the shipper, and therefore limits the right of subrogation of the insurer. A common carrier, warehouseman, or bailee, whether liable by law or custom, to the same extent as an insurer, or only for his own negligence, may, in order to protect himself against his own responsibility, cause the goods in his custody to be insured to their full value, and may recover for any loss from the perils insured against, though occasioned by the negligence of his own servants. And as such an one might lawfully obtain insurance against the loss of the goods, though occasioned by his own negligence, he may lawfully stipulate with the owner to be allowed the benefit of insurance voluntarily obtained by the latter. Such a stipulation, between the owner and the carrier, does not impair any lawful rights of the insurer. In the absence of any fraud or intentional concealment, the undisclosed existence of such a stipulation subrogating the car-

⁷ *Monmouth County Mut. Fire Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107; *Connecticut Fire Ins. Co. v. Erie Ry. Co.*, 73 N. Y. 399; *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.*, 139 U. S. 88; *Chickasaw County Farmers' Mut. Fire Ins. Co. v. Weller*, 98 Iowa, 731, 68 N. W. 443; *Sims v. Mutual Fire Ins. Co.*, 101 Wis. 586, 77 N. W. 908. See, also, *Niagara Fire Ins. Co. v. Fidelity T. & T. Co.*, 123 Pa. St. 516, 16 Atl. 790; *Insurance Co. of North America v. Martin*, 151 Ind. 209, 51 N. E. 361; *Fidelity T. & T. Co. v. Peoples' Nat. Gas Co.*, 150 Pa. St. 8.

rier to the rights of the insured, does not constitute a defense to an action on the policy. It is now the settled law that a stipulation in the bill of lading allowing the carrier the benefit of insurance procured by the owner, is valid as between the parties, though the loss be occasioned by the negligence of the carrier or his agents, and, in the absence of fraudulent concealment or misrepresentation the insurer can maintain no action against the carrier upon terms inconsistent with the stipulation.⁸ But a shipper who contracts to give the carrier the benefit of any insurance on freight cannot, in case of loss through the carrier's negligence, recover upon a policy covering the freight which stipulates that in case of loss the insurer shall be subrogated to all rights of the shipper against the carrier, and that if any right of the carrier to recover against any person is lost by any act of the insured, or if the insurance is made for the benefit of the carrier, the insurer shall not be liable.⁹

Subrogation of Insurer to Rights of Mortgagee or Creditor.

Where a mortgagee insures solely on his own account, it is but an insurance on his debt, and an extinguishment of the debt extinguishes his rights under the policy. But if the fire occurs before the payment or extinguishment of the debt and mortgage, the insurers are bound to pay the amount of the debt, not exceeding the stipulated amount of insurance, and upon such payment are often entitled by contract to an assignment of the debt from the mortgagee, and may recover the same from the mortgagor, either at law or in equity, accord-

⁸ Jackson Co. v. Boylston Mut. Ins. Co., 139 Mass. 508; Phœnix Ins. Co. v. Erie & W. Transportation Co., 117 U. S. 312; Wager v. Providence Ins. Co., 150 U. S. 99; Platt v. Richmond Y. R. & C. R. Co., 108 N. Y. 358.

⁹ Fayerweather v. Phenix Ins. Co., 118 N. Y. 324.

ing to circumstances.¹⁰ But an insurer when paying insurance covering only part of a mortgage debt, is not subrogated to the rights of the mortgagee until the mortgage debt is paid in full.¹¹ Where a policy provides that the loss, if any, shall be payable to the mortgagee, that as to the mortgagee the policy should not be invalidated by any act or neglect of the mortgagor, that if the insurance company paid the mortgage, claiming that as to the mortgagor no liability existed, it should, to the extent of payment, become entitled to an assignment of the mortgage debt and all securities, the insurer does not become subrogated to the rights of the mortgagee unless it was not in fact liable to the mortgagor.¹² Where the mortgagor assigns a policy to the mortgagee as part security for a mortgage debt, and afterwards satisfies the mortgage, he becomes entitled to subrogation to the rights of the mortgagee in the policy.¹³

¹⁰ Ch. XVI; *Royal Ins. Co. v. Stinson*, 103 U. S. 25. See cases in note 11.

¹¹ *Phenix Ins. Co. v. First Nat. Bank*, 85 Va. 765, 2 L. R. A. 667. See, also, as to subrogation of insurer to mortgagee's rights, *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. Law, 541; *Concord Union Mut. Fire Ins. Co. v. Woodbury*, 45 Me. 447; *Grange Mill Co. v. Western Assur. Co.*, 118 Ill. 396; *Bound Brook Mut. Fire Ins. Ass'n v. Nelson*, 41 N. J. Eq. 485; *Attleborough Sav. Bank v. Security Ins. Co.*, 168 Mass. 147, 46 N. E. 390; *Hare v. Headley*, 52 N. J. Eq. 496, 35 Atl. 445; *Ordway v. Chace*, 57 N. J. Eq. 478, 42 Atl. 149; *Heins v. Wicke*, 102 Iowa, 396, 71 N. W. 345; *Merchants' Ins. Co. v. Story*, 13 Tex. Civ. App. 124, 35 S. W. 68.

¹² *Traders' Ins. Co. v. Race*, 142 Ill. 338, 31 N. E. 392.

¹³ *Billings v. German Ins. Co.*, 34 Neb. 502, 52 N. W. 397, 18 Am. Law Reg. 737. See, also, as to insurance obtained by mortgagor for protection of mortgage debt, *Pearman v. Gould*, 42 N. J. Eq. 4; *Pendleton v. Elliott*, 67 Mich. 496, 35 N. W. 97; *Traders' Ins. Co. v. Race*, 142 Ill. 338, 31 N. E. 392; *Wood v. Northwestern Ins. Co.*, 46 N. Y. 421.

As to right of agent to be subrogated to extent of premiums paid by him, see *Boston Safe D. & T. Co. v. Thomas*, 59 Kan. 470, 53 Pac. 472.

CHAPTER XVIII

WAIVER AND ESTOPPEL.

§ 235. Definition.

236. Division.

237. By Whom.

238. Estoppel.

§ 235. Definition — A waiver is a voluntary and intentional relinquishment of a known right — an election by one to dispense with something of value or to forego some advantage he might have taken or insisted upon.

§ 236. Division — A waiver may be either express, as where one explicitly relinquishes a right; or implied, that is by any acts or statements on the part of one having the right to enforce a forfeiture which might fairly and reasonably induce the opposite party to believe that the forfeiture is dispensed with or excused, and which influence him to rely thereon in good faith and act accordingly. Proof of an implied waiver must show

(a) Knowledge on the part of the one waiving of the facts giving him the right to insist upon the forfeiture, and

(b) Acts, words or circumstances from which it is fairly inferable that he did not intend to insist upon or assert the forfeiture.

§ 237. By Whom — Either party to an insurance contract can waive the benefit and enforcement of provisions inserted for his advantage.

§ 238. Estoppel — An estoppel in pais arises when one by his acts or representations, or silence when he should speak, intentionally, or by culpable negligence, induces another to believe that certain facts exist, or that the former will do certain things, and such other rightfully acts on the belief so induced and will be prejudiced by permitting the one to act contrary to the belief he has induced.

Waiver is a voluntary act, and implies an election by one in possession of a right, and with full knowledge of the facts

concerning it, to do or forbear from doing something inconsistent with the existence of the right and his intention to assert it. The foundation of the doctrine of estoppel lies in the desire of the courts to promote and enforce good faith and fair dealing, and to that end the rule has been formulated that if a party to a contract, knowing of the forfeiture of the rights of the other party thereunder, so bears himself thereafter in relation to the contract, as fairly to lead the other to believe and act on the belief that he still recognizes the contract to be in force and binding upon him, he will thereafter be estopped from asserting that forfeiture.

The conditions of any contract may be waived by the mutual consent of the parties to it, or by the party for whose benefit the conditions were intended. A waiver of a stipulation, in an agreement, must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. This is the rule whether there be a direct and precise agreement to waive, or whether it be sought to deduce a waiver from the acts, conduct or declarations of the party.

The doctrine of waiver, as asserted against insurance companies, in connection with insurance contracts, to avoid the strict enforcement of conditions contained in their contracts, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions. To a just application of this doctrine it is essential that the party sought to be estopped from denying the waiver claimed, should be shown to have been apprised of all the facts, prior to or at the time of the alleged waiver. To operate by way of estoppel *in pais*, or equitable estoppel, it is necessary that the act, declaration, or silence, as the case may

be, of the insurer, should be of such a nature, and brought to the knowledge and notice of the insured under such circumstances, as to justifiably influence him, while acting honestly, fairly, and reasonably, in such a way, and to such an extent, that the repudiation of such inference, drawn by the insured, and acted on by him, would work to his prejudice.

In the case of an express waiver of a forfeiture, the old contract is modified, or a new contract is made, according to circumstances. In the case of an implied waiver, or an estoppel, the law simply operates to prevent the party who might have claimed the forfeiture, from asserting it. Thus an insurer may waive the payment of the premium when it is due, or any act forbidden by the policy, or which *per se* avoids the policy, but the basis of the waiver, if it be implied, is estoppel. Unless with knowledge of a forfeiture actually existing the insurer does or omits some act whereby the assured has just ground to believe, does believe, and acts on the belief that the insurer will continue, or restore the contract, and will not insist upon the forfeiture, there is no estoppel, and there can be no waiver.¹

Where there has been a breach of a condition contained in an insurance policy, the insurer may or may not take advantage of the breach or claim the forfeiture. It may consult its own interests, and choose to waive the forfeiture, and this it may do by express language to that effect, or by acts from which an intention to waive may be inferred, or from which a waiver follows as a legal result. A waiver cannot be in-

¹ *Unsell v. Hartford L. & A. Ins. Co.*, 32 Fed. 443; *Thompson v. Knickerbocker Life Ins. Co.*, 104 U. S. 252; *Equitable Life Assur. Soc. v. McElroy (C. C. A.)*, 83 Fed. 638; *Kenton Ins. Co. v. Wigginton*, 89 Ky. 330, 7 L. R. A. 81; *Northwestern Mut. Life Ins. Co. v. Amerman*, 119 Ill. 329; *Hartford L. A. Ins. Co. v. Unsell*, 144 U. S. 439; *Carlsor v. Supreme Council, A. L. H.*, 115 Cal. 466, 35 L. R. A. 643; *Tripp v. Provident Fund Soc.*, 140 N. Y. 23.

ferred from mere silence, unless there be a duty to speak, and silence be likely to mislead, so that in effect a fraud is perpetrated. An insurer is not obliged to say or do anything, to make a self-executing forfeiture effectual. It may wait until a claim is made under the policy, and then, in denial thereof, or in defense of a suit commenced therefor, allege the forfeiture. But if, in any negotiations or transactions with the insured, after a forfeiture has taken place, and has come to the knowledge of the insurer, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured, by virtue thereof, to do some act, or incur some trouble or expense, the forfeiture is, as a matter of law, waived.²

Forfeitures are not favored, either in law or in equity. Stipulations providing for forfeiture will be strictly construed, and courts are often prone to recognize and give effect to any circumstances that indicate an election to waive a forfeiture, or any agreement to do so on which the other party has relied and acted. Any agreement, declaration, or course of action, on the part of an insurance company, which leads the insured honestly to believe, and warrants him in believing, that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from thereafter insisting upon a forfeiture, although it might be claimed under the express language of the contract. But while courts do not favor forfeitures, they cannot avoid enforcing them when the party by whose default they are incurred cannot show some good and suitable ground in

² *Allen v. Vermont Mut. Fire Ins. Co.*, 12 Vt. 366; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 109, 28 Am. Rep. 535; *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234; *Weidert v. State Ins. Co.*, 19 Or. 261, 20 Am. St. Rep. 809.

the conduct of the other party on which to base a reasonable excuse for the default.

On the question of a waiver of an express condition of a written contract, or consent that such condition need not be complied with after its breach, there must be evidence that the subject matter of the waiver and consent was in the minds of the parties at the time, and that the acts constituting the alleged waiver were consciously and purposely done and recognized by the minds of the parties coming together upon the identical proposition. There is no estoppel where both parties, with equal opportunities of knowledge, or with the same knowledge, are each honestly mistaken concerning the facts.³

A waiver must be subsequent to the written contract, and to be operative must be made not only with knowledge of the forfeiture, and with intent to waive the provisions of the existing contract, but must be supported by a valuable consideration, or become operative by way of estoppel. An intent to waive cannot be entertained from the mere fact of knowledge, in the face of an express term of the contract made and delivered subsequent to that knowledge. Thus the mere fact of knowledge, by the insurer, prior to the issuance of the policy, of the intention of insured to take out other insurance, is not of itself a waiver of the condition in the policy subsequently delivered.⁴ Knowledge that a house was vacant at the time of the assignment of a policy, is no consent that it shall remain so

³ *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326; *Johnson v. Connecticut Fire Ins. Co.*, 84 Ky. 470; *Lyon v. Travelers' Ins. Co.*, 55 Mich. 141; *Couch v. City Fire Ins. Co.*, 37 Conn. 248; *Weidert v. State Ins. Co.*, 19 Or. 261. 20 Am. St. Rep. 809; *Hartford L. A. Ins. Co. v. Unsell*, 144 U. S. 450; *Hartford Fire Ins. Co. v. Small (C. C. A.)*, 66 Fed. 493.

⁴ *United Firemen's Ins. Co. v. Thomas (C. C. A.)*, 82 Fed. 409, 47 L. R. A. 454.

for a prohibited period.⁵ A specific waiver of a condition, for a limited time, ends upon the expiration of the time fixed.⁶ A waiver presupposes actual knowledge on the part of someone having real or apparent authority to represent and bind the insurer, of the breach of condition which is to be waived.⁷ Constructive notice, as by the filing of an instrument, is not sufficient;⁸ nor notice of an intention on the part of an insured to violate a condition.⁹

An agent will not be held to have due knowledge of outstanding insurance, where by mistake he supposes it to have expired.¹⁰ Mere knowledge of a breach, and silence on the part of the insurer, does not constitute a waiver by it.¹¹ If it be sought to prove a waiver by knowledge or an act of an agent, it must be shown that the agent had authority to act for the company in the premises, and either that he was so acting when the knowledge came to him, or, if the knowledge came to him while not acting as agent, that it was present in his mind when the policy was issued, or when he did some act in the course of his duty as agent, in recognition of the validity of the policy.¹²

⁵ *Sutherland v. Eureka F. & M. Ins. Co.*, 110 Mich. 668, 68 N. W. 985; *Ranspach v. Teutonia Fire Ins. Co.*, 109 Mich. 699, 67 N. W. 967.

⁶ *Betcher v. Capital Fire Ins. Co.*, 78 Minn. 240.

⁷ *Slobodisky v. Phenix Ins. Co.*, 52 Neb. 395, 72 N. W. 483, 53 Neb. 816, 74 N. W. 270; *Finch v. Modern Woodmen*, 113 Mich. 646, 71 N. W. 1104; *Ellis v. Insurance Co. of North America*, 32 Fed. 646.

⁸ *Shaffer v. Milwaukee Mechanics' Ins. Co.*, 17 Ind. App. 204, 46 N. E. 557.

⁹ *Home Fire Ins. Co. v. Wood*, 50 Neb. 381, 69 N. W. 941.

¹⁰ *Sanders v. Cooper*, 115 N. Y. 279.

¹¹ *Betcher v. Capital Fire Ins. Co.*, 78 Minn. 240.

¹² *Goldin v. Northern Assur. Co.*, 46 Minn. 471; *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54; *Bell v. Lycoming Fire Ins. Co.*, 19 Hun (N. Y.), 238.

Conclusiveness of Waiver.

A complete waiver is usually held to be complete, final and irrevocable, especially if it has been acted upon.¹³ But where no prejudice results, or the waiver be without consideration, it can sometimes be withdrawn.¹⁴

Waiver a Question of Fact.

Whether a given state of admitted or uncontroverted facts works a forfeiture or lapse of a policy of insurance, is a question of law. When the evidence is conflicting the truth must be determined as a question of fact.¹⁵

When the Forfeiture is Effectual.

Provisions of insurance policies providing for forfeitures, are generally self-executing. An insurance company is not bound to do or say anything to give effect to a forfeiture prescribed by the policy, and is not bound to elect to declare void, or continue a policy, which stipulates that it shall be void upon the happening of specific occurrences, without the consent of the insurer.¹⁶

Waiver of Conditions of Standard Policies.

In speaking of the provisions of the standard policy, the New York court of appeals has said: "Now, as heretofore, it is competent for the parties to a contract of insurance, by agreement in writing, or by parol, to modify the contract after the policy has been issued, or to waive conditions or forfeit-

¹³ Illinois Live Stock Ins. Co. v. Baker, 153 Ill. 240, 38 N. E. 627; Platt v. Aetna Ins. Co., 153 Ill. 113, 26 L. R. A. 853.

¹⁴ See ante, "Waiver of Proofs of Loss," notes 149-153.

¹⁵ Pool v. Milwaukee Mechanics' Ins. Co., 91 Wis. 530, 51 Am. St. Rep. 919; Cleaver v. Traders' Ins. Co., 71 Mich. 421, 39 N. W. 571.

¹⁶ Kyte v. Commercial Union Assur. Co., 149 Mass. 116; Carey v. German American Ins. Co., 84 Wis. 80; Betcher v. Capital Fire Ins. Co., 78 Minn. 240.

ures. The power of agents, as expressed in the policy, may be enlarged by usage of the company, its course of business, or by its consent, express or implied. The principle that courts lean against forfeitures is unimpaired, and in weighing evidence tending to show a waiver of conditions or forfeitures the court may take into consideration the nature of the particular condition in question, whether a condition precedent to any liability, or one relating to the remedy merely, after a loss has been incurred. But where the restrictions upon an agent's authority appear in the policy, and there is no evidence tending to show that his powers have been enlarged, there seems to be no good reason why the authority expressed should not be regarded as the measure of his power, nor is there any reason why courts should refuse to enforce forfeitures plainly incurred, which have not been expressly or impliedly waived by the company."¹⁷ But the better rule is that the requirements of a statute,—and the conditions of a standard policy are certainly required by statute,—can only be waived in the manner, and according to the terms prescribed thereby.¹⁸

¹⁷ *Quinian v. Providence Wash. Ins. Co.*, 133 N. Y. 365, 31 N. E. 31. See, also, *Harris v. Phoenix Ins. Co.*, 85 Iowa, 238, 52 N. W. 128; *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 146, 36 L. R. A. 271; *Hicks v. British America Assur. Co.*, 162 N. Y. 284; *Hobkirk v. Phoenix Ins. Co.*, 102 Wis. 13, 78 N. W. 160. See ante, c. 3, note 77.

¹⁸ *Straker v. Phenix Ins. Co.*, 101 Wis. 413, 77 N. W. 752; *O'Neil v. American Fire Ins. Co.*, 166 Pa. St. 72; *Anderson v. Manchester Fire Assur. Co.*, 59 Minn. 182 (original opinion holding standard policy legal and valid). In *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 146, the supreme court of Virginia said (page 153), speaking of the law regulating the making of a contract of insurance in that state: "It is a statutory rule for the regulation of contracts of insurance, which prescribes their scope and effect, and determines the duties and obligations of contracting parties. It is therefore as much a part of every contract * * * made after that statute was passed as if incorporated in it, the general rule being that laws in existence are necessarily referred to in all contracts made under

On the assumption that acts formulating and prescribing the terms and conditions of standard policies are valid, it has been held that the provisions of such policies are binding upon the parties, and can only be changed or waived in the manner indicated by the acts.¹⁹ A statutory provision that no action shall be begun on an insurance policy within ninety days after notice of loss, has been given, prevents the insured from bringing suit within that time, although the insurer, prior thereto, has absolutely denied liability.²⁰ This is at variance with the general rule governing voluntary contracts of insurance, which holds that a denial of liability waives the performance by the insured and deprives the insurer of the benefit of conditions subsequent to the loss, and precedent to the maintenance of an action.²¹

Collusion Between Agent and Insured.

An insured cannot take advantage of a waiver resulting from any fraudulent and collusive agreement between himself and an agent of the insurer. No man can take advantage of his own wrongful act.²²

Waiver Must be Pledaded.

A general denial does not tender an issue of waiver.²³

such laws, and that no waiver of the parties, nor stipulations in the contract, can change the law,"—citing *Hermany v. Fidelity Mut. Life Ass'n*, 151 Pa. St. 17; *Fidelity Mut. Life Ass'n v. Ficklin*, 74 Md. 172, 185; *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 9 L. R. A. 45; *White v. Provident S. Life Assur. Soc.*, 163 Mass. 108, 27 L. R. A. 398.

¹⁹ *Hobkirk v. Phoenix Ins. Co.*, 102 Wis. 13, 78 N. W. 161; *Anderson v. Manchester Fire Assur. Co.*, 59 Minn. 182.

²⁰ *Finster v. Merchants' & B. Ins. Co.*, 97 Iowa, 9, 65 N. W. 1004.

²¹ *Finster v. Merchants' & B. Ins. Co.*, 97 Iowa, 9, 65 N. W. 1004.

²² *Rockford Ins. Co. v. Nelson*, 75 Ill. 548; ante, c. 8, "Agents."

²³ *Guerin v. St. Paul F. & M. Ins. Co.*, 44 Minn. 20; *Continental Ins. Co. v. Vanue*, 126 Ind. 410, 26 N. E. 119.

*Illustrations.***Waiver — At Time of Issuing Policy.**

An insurance company, whose authorized agent, with full knowledge of the facts, issues a policy which, on account of the existence of such facts would be void in its incipency, and receives premiums therefor, cannot, in the event of a loss, set up such facts to defeat a recovery on the policy.²⁴

Same — During the Running of the Risk.

Any known breach of the condition of the policy, or cause of forfeiture, is waived by a recognition of the validity of the policy thereafter.²⁵

Same — After the Loss.

If, after a loss has occurred, and the fact becomes known to the insurer that a defense to the policy exists, or that a forfeiture has been incurred, the insurer takes affirmative action amounting to a confession of its liability, which induces the insured to believe that the loss will be paid, and to do acts

²⁴ *McElroy v. British America Assur. Co.* (C. C. A.), 94 Fed. 990 (existing insurance); *Germania Fire Ins. Co. v. Klewer*, 129 Ill. 599, 22 N. E. 489 (vacancy); *Hobkirk v. Phoenix Ins. Co.*, 102 Wis. 13, 78 N. W. 161 (existence of chattel mortgage); *Miller v. Hartford Fire Ins. Co.*, 70 Iowa, 704 (other insurance); *Breckinridge v. American Cent. Ins. Co.*, 87 Mo. 62; *Phoenix Ins. Co. v. La Pointe*, 118 Ill. 384 (incumbrances); *Rife v. Lebanon Mut. Ins. Co.*, 115 Pa. St. 530 (increased risk); *Liverpool & L. & G. Ins. Co. v. Ende*, 65 Tex. 118 (condition of title); *Michigan Shingle Co. v. State Inv. & Ins. Co.*, 94 Mich. 389, 53 N. W. 945 (waiver of clear space clause). See, also, ante, c. 8, "Agents."

²⁵ *Webster v. Phoenix Ins. Co.*, 36 Wis. 67; *Powell v. Factors' & Traders' Ins. Co.*, 28 La. Ann. 19; *Seibel v. Northwestern Mut. Relief Ass'n*, 94 Wis. 253, 68 N. W. 1009; *Williams v. Niagara Fire Ins. Co.*, 50 Iowa, 561; *Insurance Co. of North America v. Garland*, 108 Ill. 220; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. St. 402; *Landers v. Watertown Fire Ins. Co.*, 86 N. Y. 414; *Carpenter v. Providence Wash. Ins. Co.*, 16 Pet. (U. S.) 495.

based on such belief which are attended with some trouble or expense, such conduct will amount to a waiver. The rule is that when an insurance company becomes aware that all rights under a policy have been lost, it cannot, for an indefinite period, disguise its purpose to resist payment of the loss by affirmative action which would lead the insured to believe that it admits its liability, and intends to discharge it.²⁶ Thus an adjustment of a loss, with full knowledge by the insurer, of the violations of a condition of the policy, and without notifying the insured of an intention to insist upon the forfeiture, is a waiver of its rights to assert the forfeiture;²⁷ and the collection of a premium for the insurance covering the loss;²⁸ and the requirement of original proofs of loss, or the amendment of defective proofs;²⁹ and a demand for arbitration.³⁰

An insurer cannot take advantage of a neglect to bring a suit within the time limited by the policy, where it has contributed to the delay by holding out hopes of an amicable adjustment.³¹ But mere negotiations for settlement do not

²⁶ *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S. 234; *Equitable Life Assur. Soc. v. Hiett's Adm'r*, 19 U. S. App. 173, 185, 7 C. C. A. 359, 58 Fed. 541; *Roby v. American Cent. Ins. Co.*, 120 N. Y. 510, 24 N. E. 808; *Hollis v. State Ins. Co.*, 65 Iowa, 454, 21 N. W. 774.

²⁷ *Cleaver v. Traders' Ins. Co.*, 71 Mich. 414, 15 Am. St. Rep. 275; *Godchaux v. Merchants' Mut. Ins. Co.*, 34 La. Ann. 235; *Levy v. Peabody Ins. Co.*, 10 W. Va. 560; *Fishbeck v. Phenix Ins. Co.*, 54 Cal. 422.

²⁸ *Phenix Ins. Co. v. Tomlinson*, 125 Ind. 84, 21 Am. St. Rep. 203. See, also, *Schreiber v. German-American Hail Ins. Co.*, 43 Minn. 367; *Smith v. Continental Ins. Co.*, 6 Dak. 433, 43 N. W. 810.

²⁹ *Hanscom v. Home Ins. Co.*, 90 Me. 333; *Jerde v. Cottage Grove Fire Ins. Co.*, 75 Wis. 345, 44 N. W. 636. Any objection to the sufficiency of the proofs of loss is waived by denial of liability on the ground that the policy was not issued. *Campbell v. American Fire Ins. Co.*, 73 Wis. 100, 40 N. W. 661.

³⁰ See ante, c. 15, "Arbitration and Award."

³¹ *Allemania Ins. Co. v. Peck*, 133 Ill. 220; *Thompson v. Phenix Ins. Co.*, 136 U. S. 287.

waive the condition requiring suit to be brought within a specified time;³² and it has been held that an insurer, by putting its refusal to pay a loss upon a specified ground, and prior to the commencement of an action, cannot, after suit brought, defend on any other grounds.³³ But this holding can hardly be said to be supported by reason or logic.

No Waiver.

In answer to a suit brought on a policy, an insurer is entitled to assert all possible defenses which are not inconsistent with each other.³⁴ An estoppel cannot be based upon intimations of legal conclusions;³⁵ nor upon acts performed after the time when the other party claims to have been misled by them.³⁶ There can be no estoppel against pleading the illegality of a policy.³⁷ A party is not compelled to assert, upon the first trial of an action, all issues available upon the record.³⁸ A waiver of a violation of one condition of a

³² *Allemania Ins. Co. v. Little*, 20 Ill. App. 431.

³³ *Castner v. Farmers' Mut. Fire Ins. Co.*, 50 Mich. 273; *Douville v. Farmers' Mut. Fire Ins. Co.*, 113 Mich. 158, 71 N. W. 517. But see *contra*, *Hubbard v. Mutual Reserve Fund Life Ass'n*, 80 Fed. 681. See, also, on waiver of forfeiture after loss, *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 419; *Prentice v. Knickerbocker Life Ins. Co.*, 77 N. Y. 483; *McGurk v. Metropolitan Life Ins. Co.*, 56 Conn. 528, 1 L. R. A. 563; *Kiernan v. Dutchess County Mut. Ins. Co.*, 150 N. Y. 190, 44 N. E. 698; *Dohlantry v. Blue Mounds F. & L. Ins. Co.*, 83 Wis. 181, 53 N. W. 448; *New York Life Ins. Co. v. Baker*, 49 U. S. App. 690, 83 Fed. 647.

³⁴ *Kahnweiler v. Phoenix Ins. Co.*, 57 Fed. 562; *La Plant v. Firemen's Ins. Co.*, 68 Minn. 82. See, also, *ante* c. 13, "Notice and Proofs of Loss," notes 124-147, 154-157.

³⁵ *Packard v. Connecticut Mut. Life Ins. Co.*, 9 Mo. App. 469.

³⁶ *Behrens v. Germania Fire Ins. Co.*, 64 Iowa, 19.

³⁷ *Spare v. Home Mut. Ins. Co.*, 8 Sawy. (U. S.) 618, 15 Fed. 707.

³⁸ *Moulou v. American Life Ins. Co.*, 111 U. S. 335.

policy is not a waiver of any other condition.³⁹ An examination of the insured under oath, or an appraisement, does not prevent the insurer from thereafter claiming a forfeiture, where the contract provides that such acts shall not constitute a waiver.⁴⁰ A waiver and estoppel must be predicated upon acts of the insurer which have misled the insured to his prejudice.⁴¹ A waiver cannot be predicated upon mere silence and inaction of an insurer after the loss;⁴² nor at any time unless silence would be misleading and deceptive.⁴³ Where a policy provides that no action for recovery thereon can be maintained unless commenced within a specified time after the fire, and that no provision or condition, or any forfeiture, shall be waived by any act or proceeding relating to the appraisal, the adjustment of a loss does not excuse a failure to bring a suit within the required time.⁴⁴ Submission to arbitration is not, of itself, a waiver by the insurer of an election to rebuild, nor does it exclude the possibility of a previous waiver, nor does it affect the status of the parties in any other particular, where the policy expressly provides that the appraisement is without reference to any other question.⁴⁵ The mere offer of an insurer to pay an amount less than that

³⁹ *Trott v. Woolwich Mut. Fire Ins. Co.*, 83 Me. 362; *St. Onge v. Westchester Fire Ins. Co.*, 80 Fed. 703.

⁴⁰ *City Drug Store v. Scottish U. & N. Ins. Co.* (Tex. Civ. App.), 44 S. W. 21.

⁴¹ *Ante*, notes 1 to 9; *Georgia Home Ins. Co. v. Rosenfield* (C. C. A.), 95 Fed. 358; *Alabama State Mut. Assur. Co. v. Long Clothing & Shoe Co.* (Ala.), 26 So. 655; *Globe Mut. Life Ins. Co. v. Wolff*, 95 U. S. 326; *McCormick v. Springfield F. & M. Ins. Co.*, 66 Cal. 361.

⁴² *Gibson Electric Co. v. Liverpool & L. & G. Ins. Co.*, 159 N. Y. 418, 54 N. E. 23.

⁴³ *Ante*, notes 1 to 9; *East Texas Fire Ins. Co. v. Perkey*, 89 Tex. 604, 35 S. W. 1050.

⁴⁴ *Willoughby v. St. Paul German Ins. Co.*, 68 Minn. 373.

⁴⁵ *Platt v. Aetna Ins. Co.*, 153 Ill. 113, 26 L. R. A. 853.

claimed by the insured, by way of compromise and settlement of a loss, will not alone constitute a waiver of its rights to assert forfeitures of the policy, or a failure to comply with its conditions, when there is no statement or admission of fact, in recognition of the validity of the policy, which can be divorced from the offer of settlement, and the insured is not in any way prejudiced thereby. A man may, without prejudice to his rights, offer to buy his peace.⁴⁶

⁴⁶ *Richards v. Continental Ins. Co.*, 83 Mich. 508, 21 Am. St. Rep. 611; *Houdeck v. Merchants' & B. Ins. Co.*, 102 Iowa, 303, 71 N. W. 354; *Hubbard v. Mutual Reserve Fund Life Ass'n*, 80 Fed. 681; *Cook v. Continental Ins. Co.*, 70 Mo. 610; *Eastern R. Co. v. Relief Fire Ins. Co.*, 105 Mass. 579; *Roberts v. Northwestern Nat. Ins. Co.*, 90 Wis. 210, 62 N. W. 1048; *Lake v. Farmers' Ins. Co.*, 110 Iowa, 473, 81 N. W. 711. See, ante, c. 14, notes 158-168, "Waiver of Notice and Proofs of Loss."

CHAPTER XIX.

REINSURANCE.

- § 239. Definition and Nature.
- 240. Who may Sue.
- 241. Right to Reinsure.
- 242. Insurable Interest.
- 243. Form and Essentials of Contract.
- 244. Agents' Powers.
- 245-248. The Contract.
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DEFINITION AND NATURE.

§ 239. A simple contract of reinsurance is an agreement whereby an insurer is promised indemnity to a specified amount against a risk assumed by him under a contract of insurance in favor of a third party.

The party indemnified is called the reinsured; the one indemnifying is called the reinsurer.

A contract of reinsurance has the qualities and incidents of a contract of simple insurance.

Contracts of reinsurance, by which one insurer causes the sum which he has insured to be reassured to him by a distinct contract with another insurer with the object on the part of the first named of indemnifying himself against his own responsibility (though prohibited for a time in England by statute), were valid by the common law, and have always been lawful in this country. Mr. Kent thus states the law: "After an insurance has been made the insurer may have the entire sum he hath insured, reassured to him by some other insurer. The object of this is indemnity against his own act; and, if he

gives a less premium for the reinsurance, all his gain is the difference between what he receives as a premium for the original insurance and what he gives for the indemnity against his own policy. * * * These reassurances are prohibited in England except in special cases. * * * The contract of reinsurance is totally distinct from and unconnected with the primitive insurance, and the reassured is obliged to prove the loading and value of the goods, and the existence and extent of the loss, in the same manner as if he were the original insured. * * * If he proves the original claim against him to be valid when he resorts over to the reinsurer, he makes out a case for indemnity."

Thus it will be seen that a contract of reinsurance is but a modification of the ordinary contract of insurance. The reinsurer assumes altogether, or in part, the risk of the original insurer. The thing insured is the same as in the original contract; but the subject of indemnity is the risk assumed by the first insurer. It is very similar to the common case of simple insurance in favor of a mortgagee who becomes insured against loss of the property mortgaged, which in such case is the subject of the risk; while the subject of indemnity is the mortgage debt. The purpose and effect of reinsurance is to throw the risk of the primitive insurer, who is in this connection called the reinsured, upon another insurer, who is called the reinsurer. Indemnity to the reinsured is the underlying principle. To indemnify means to secure and protect from, or to compensate for, damage or liability that may happen from a given act or event. If the reinsured is not liable upon his own contract of insurance he cannot recover against the reinsurer. But the proof of *liability* is sufficient. It is not necessary that the reinsured pay the loss or discharge his liability before proceeding against the reinsurer.¹

¹ 3 Keat, Comm. § 279; Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind.

WHO MAY SUE.

§ 240. Reinsurance frequently inures to the benefit of the original insured.

A *simple* contract of reinsurance is a contract of indemnity whereby the insurer reinsures one or more of its risks in another company, and is solely for the benefit of the primitive insurer. In such a contract its policy-holders have no concern, are not the parties for whose benefit the contract of reinsurance is made, and they cannot, therefore, sue thereon.² But the contract frequently goes further than this and looks toward the protection of the original insured and embraces also an express agreement of the reinsurer to assume and pay the losses of the policy-holder; and it is therefore an agreement upon which the latter is entitled to maintain an action directly against the reinsurer. Whether the original policy-holders have any right of action against the reinsurer depends upon whether the contract of reinsurance provides for indemnity to them or merely to the first insurer, e. g. where one insurance company sold to another its entire business, good will and property in consideration whereof the latter

443; *Home v. Mutual Safety Ins. Co.*, 1 Sandf. (N. Y.) 137, 2 Bennett, Fire Ins. Cas. 580; *Merchants' Mut. Ins. Co. v. New Orleans Mut. Ins. Co.*, 24 La. Ann. 305; *Barnes v. Hekla Fire Ins. Co.*, 56 Minn. 38; *Fame Ins. Co.'s Appeal*, 83 Pa. St. 396; *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. (N. Y.) 359; *Bartlett v. Fireman's Fund Ins. Co.*, 77 Iowa, 158, 41 N. W. 601; *Faneuil Hall Ins. Co. v. Liverpool & L. & G. Ins. Co.*, 153 Mass. 67, 10 L. R. A. 423; *Phoenix Ins. Co. v. Erie & W. Transportation Co.*, 117 U. S. 312; *Smith v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch. 727; *Philadelphia Ins. Co. v. Washington Ins. Co.*, 23 Pa. St. 250.

² Cases in note 1, ante; *Price v. St. Louis Mut. Life Ins. Co.*, 3 Mo. App. 262; *Herckenrath v. American Mut. Ins. Co.*, 3 Barb. Ch. (N. Y.) 63; *Strong v. Phoenix Ins. Co.*, 62 Mo. 289; *Delaware Ins. Co. v. Quaker City Ins. Co.*, 3 Grant Cas. (Pa.) 71. See post, notes 6, 7 and 8.

"reinsured the risks of the former and agreed that all losses arising under the policies of the original insurer shall be borne, paid and satisfied by the insurer," the original insured is entitled to maintain an action against the reinsurer for a loss covered by his policy.³

And a contract whereby one insurer reinsures another on all risks of the latter for which it has policies outstanding and "agrees to assure such policies and to pay to the policy-holders all such sums as the 'reinsured' may by force of such policies become liable to pay," is for the benefit of the policy holders. It may be enforced by them without getting judgment against the first insurer, and includes liability of the first insurer for damages for failure to continue its contract.⁴ In such case a policy-holder may sue either company. The remedies are not inconsistent and he is not put to an election. He may have an action against each, though he can have but one satisfaction.⁵ An agreement by one insurance company with the agent of another company to take a risk and issue a policy to certain policy-holders in lieu of one which the latter company has ordered cancelled, is not a reinsurance of such company cancelling its own risk, so as to enable it to sue in its own name for payment of a loss occurring before the first policy was cancelled and the latter delivered. But property owners can maintain an action on such an agreement.⁶ And upon the principle that a creditor, for the purpose of satisfying his debt, may, in equity, avail himself of any subsisting provision made by his insolvent debtor for its payment, a reinsurer may be compelled to pay the amount of the loss for

³ *Johannes v. Phenix Ins. Co.*, 66 Wis. 56, 27 N. W. 414.

⁴ *Fischer v. Hope Mut. Life Ins. Co.*, 69 N. Y. 161; *Glen v. Hope Mut. Life Ins. Co.*, 56 N. Y. 379, 4 Bigelow, Life & Acc. Ins. Cas. 339.

⁵ *Barnes v. Hekla Fire Ins. Co.* 56 Minn. 38.

⁶ *Merchants' Ins. Co. v. Union Ins. Co.*, 162 Ill. 173.

which it is liable directly to the insured or the party ultimately entitled to the money, when the prior insurer whom it has indemnified has become insolvent.⁷

But where by the terms of the contract in controversy, the defendants "reinsure the American Insurance Co., upon the following policies issued by them" (describing them), "loss, if any, payable to the *assured* upon the same terms and conditions as contained in the original policies," it was held that the word "assured" meant the party reinsured, and not a property owner to whom a policy had been issued; that the latter could not maintain an action upon the contract; and that oral evidence was inadmissible to show the meaning attached to that word by the parties at the time of making the contract.⁸

When the reinsurance is available to the insured, he may take advantage of it or not at his option. He may sue either the insurer or the reinsurer or both; but can collect only from one.^{8a}

RIGHT TO REINSURE.

§ 241. In the absence of any statutory prohibition and of any specific stipulation in the policy to the contrary, there can be no doubt of the right of an insurer to effect reinsurance.

Under the general powers conferred upon an insurance company to make contracts of insurance, it is authorized, (a) to seek indemnity by reinsuring its risks either in whole or in part, or (b) to give the same protection and indemnity to another insurer by assuming the risks of the latter.⁹ An insur-

⁷ *Hunt v. New Hampshire F. U. Ass'n*, 68 N. H. 305, 38 Atl. 145, 38 L. R. A. 514. See ante, notes 1, 2.

⁸ *Carrington v. Commercial F. & M. Ins. Co.*, 1 Bosw. (N. Y.) 152. And see *Jackson v. St. Paul F. & M. Ins. Co.*, 99 N. Y. 124.

⁸ *Barnes v. Hekla Fire Ins. Co.*, 56 Minn. 41.

⁹ *Cases ante*; *Sun Ins. Office v. Merz*, 63 N. J. Law, 365, 43 Atl. 693; *Insurance Co. of North America v. Hibernia Ins. Co.*, 140 U. S. 565;

ance company authorized to do business upon either the stock or mutual plan may reinsure its risks, and may transfer its property including premium notes as a consideration therefor, at least where the new contract inures to the benefit of the policy-holders; and a failure of the original company to comply with the law forbidding it to do business without having a given number of members, or a given amount of assets and premium notes, does not prevent it from indemnifying itself against loss on risks already assumed.¹⁰

In Ohio the right of a mutual company to reinsure the risks of a similar company is denied.¹¹ In Iowa a contrary rule obtains with this limitation, viz.: that the reinsurer cannot divert the mortuary or trust funds collected from its own members to any other purposes than those specified in its articles of incorporation or by-laws, and that therefore an undertaking to pay all the liabilities of the reinsured for accrued death losses from such funds is *ultra vires* and void.¹²

A fire insurance company which has authority to take risks on all kinds of property, may contract to reinsure the risks of another company notwithstanding the grant of a special power to "reinsure themselves."¹³

New York Bowery Fire Ins. Co. v. New York Fire Ins. Co., 17 Wend. (N. Y.) 359; Chalaron v. Insurance Co. of North America, 48 La. Ann. 1582, 36 L. R. A. 742.

¹⁰ Davenport Fire Ins. Co. v. Moore, 50 Iowa, 626; Brum v. Merchants' Mut. Ins. Co., 4 Woods (U. S.), 156, 16 Fed. 140; post, note 21; Temperance Mut. Ben. Ass'n v. Home Friendly Soc., 187 Pa. St. 38.

¹¹ State v. Monitor Fire Ass'n, 42 Ohio St. 555. See, also, People v. Empire Mut. Life Ins. Co., 92 N. Y. 105.

¹² Twiss v. Guaranty Life Ass'n, 87 Iowa, 733, 55 N. W. 8, 43 Am. St. Rep. 418; Cathcart v. Equitable Mut. Life Ass'n, 111 Iowa, 471, 82 N. W. 964; Davenport Fire Ins. Co. v. Moore, 50 Iowa, 626; Bent v. Hart, 73 Mo. 641; Alexander v. Williams, 14 Mo. App. 13.

¹³ Fame Ins. Co.'s Appeal, 83 Pa. St. 396. Compare Cannon v. Home Ins. Co., 53 Wis. 585; Alexander v. Williams, 14 Mo. App. 13; Mason

INSURABLE INTEREST.

242. The one procuring reinsurance must have an insurable interest in the risk reinsured.

It is well settled that an insurer of property or lives acquires by his contract of insurance an insurable interest in the property or life insured; and this interest he may protect by reinsuring either the whole or part of the risk. But a contract of reinsurance which by its terms makes the reinsurer liable for losses on property or lives in which at the date of reinsuring the reinsured had no insurable interest, is invalid. As regards the necessity for the existence of an insurable interest in the insured, the contract of reinsurance has all the qualities and incidents of a contract of simple insurance.¹⁴

FORM AND ESSENTIALS OF CONTRACT.

§ 243. The contract of reinsurance

- (a) Is not within the Statute of Frauds, i. e. it may be established by parol;
- (b) Must contain all the elements of a contract of simple insurance.

(a) An agreement to reinsure is not an undertaking to answer for the debt or default of the first insurer; but is an original undertaking entered into with him to indemnify either him, or the owner of the insured property, or the payee or beneficiary under the first policy, to the specified amount, in case a loss or death occurs, or the event insured against happens. It is in no sense a contract of guaranty or suretyship; but under it the reinsurer, as between the immediate

v. Cronk, 125 N. Y. 496; Casserly v. Manners, 48 How. Pr. (N. Y.) 219. See post, notes 19-22, 66-76.

¹⁴ Manufacturers' F. & M. Ins. Co. v. Western Assur. Co., 145 Mass. 419; Phoenix Ins. Co. v. Erie & W. Transportation Co., 117 U. S. 312; Sun Ins. Office v. Merz, 63 N. J. Law, 365, 43 Atl. 693; Chalaron v. Insurance Co. of North America, 48 La. Ann. 1582, 36 L. R. A. 742.

parties, assumes the risk absolutely. He takes the place of the first insurer, assuming all or part of the liability; and is bound in any event to answer either to him, or to the payee in the original policy, when the liability matures. The statute of frauds has no application to a contract of that nature.¹⁵

(b) The contract must be complete, definite, and certain in all its terms, i. e. as to parties, the risk insured against, the commencement, duration, and extent of liability, and the consideration.¹⁶

AGENT'S POWER.

§ 244. It is incumbent upon the party alleging the existence of a contract of reinsurance to produce competent and sufficient evidence of the authority of the agent executing the contract to bind the reinsurer in the premises.

Neither the procuring of a contract of reinsurance in favor of his company, nor the issuing of such a contract in favor of another insurer, can be said to be within the scope of the authority of an ordinary insurance agent. The principal will be bound only when either actual or apparent power to bind it by effecting reinsurance is shown to exist in the one exercising such power, except in cases where an unauthorized act is adopted or ratified by the principal himself.¹⁷ A general power given to an agent to reinsure risks taken by another association does not authorize him, in the absence of any act

¹⁵ *Bartlett v. Fireman's Fund Ins. Co.*, 77 Iowa, 155, 41 N. W. 601; *Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 318.

¹⁶ *Ante*, c. 5; *post*, notes 17-20; *Home Marine Ins. Co. v. Smith* (1898), 2 Q. B. 351, 67 Law J. Q. B. 777; *Union Ins. Co. v. American Fire Ins. Co.*, 107 Cal. 327, 28 L. R. A. 692; *Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 318.

¹⁷ *Ante*, c. 4; *Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 318; *Phœnix Ins. Co. v. Anchor Ins. Co.*, 4 Ont. 524.

of acquiescence or ratification by his company, to reinsure himself or others for whom he is acting as agent. One who is the agent of two companies, having placed a risk in one, cannot reinsure it in the other.¹⁸ The reason for this is that the same person cannot, without the consent of his principals, act as agents of both in their mutual transactions where the interests of the different principals would be opposed. Yet a transaction is not necessarily void merely because it is had or made between two corporations which have the same executive officers, provided the corporations have the right within the scope of their corporate powers to deal with each other in that particular. The power of each to contract with the other is not lost or destroyed by the fact that some or all of the directors of each are common to both. But the directors in such case must act in good faith and with fidelity to the interests of both corporations; and a showing of actual fraud or of any appreciable advantage received by either corporation to the disadvantage of the other, will be sufficient to justify the courts in refusing their sanction.¹⁹ Thus the reinsurance of the policies and the transfer of the whole reserve of a solvent life insurance company to an insolvent company, without security, by directors who have bought the stock of the former is a fraud on the policy-holders and consequently void.²⁰ A provision in a charter that "this company shall have power to make reinsurance upon any or all risks taken by them" does not give the directors power to close out the business of the company; but when the best interests of the company demand

¹⁸ *Timberlake v. Beardsley*, 22 App. Div. (N. Y.) 439; *Mercantile Mut. Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 408.

¹⁹ *Alexander v. Williams*, 14 Mo. App. 13; *Leavenworth County Com'rs v. Chicago, R. I. & P. Ry. Co.*, 134 U. S. 688; *San Diego, O. T. & P. B. R. Co. v. Pacific Beach Co.*, 112 Cal. 53, 33 L. R. A. 788.

²⁰ *Mason v. Cronk*, 125 N. Y. 500; *Casserly v. Manners*, 48 How. Pr. (N. Y.) 219.

it, it is within their power and it is their duty to reinsure; and they can do this in contemplation of proceedings for dissolution; and as a consideration therefor they can transfer the personal property of the company, provided that the reinsurance be properly and reasonably effected.²¹ Such an arrangement, if made injudiciously or in bad faith, might be of a nature and tenor to bind the contracting parties, and yet not be effectual to place the property transferred beyond the reach of the creditors of the transferor.²²

THE CONTRACT.

§ 245. A contract of reinsurance will receive such a construction as is ordinarily and naturally inferable from its terms and conditions.

The general rule is that a policy takes effect from its date, unless it be otherwise agreed, or unless there is evidence of a contrary intent.

The failure of the reinsured to disclose all facts material to the risk is ground for rescission.

The rights of an original insured under a contract of reinsurance executed for his benefit are determined as in a case of simple insurance.

§ 246. An insurer who has reinsured the whole or part of his risk is entitled only to indemnity within the amount of the reinsurance. He will not be allowed to profit by the transaction.

§ 247. Judgments obtained by the original insured against the original insurer on account of the risk reinsured are binding upon the reinsurer only when the latter was given prompt notice of the litigation, and had opportunity to assume the defense.

²¹ *Jameson v. Hartford Fire Ins. Co.*, 14 App. Div. 380, 44 N. Y. Supp. 15; *Temperance Mut. Ben. Ass'n v. Home Friendly Soc.*, 187 Pa. St. 38; *Davenport Fire Ins. Co. v. Moore*, 50 Iowa, 619; *McKean v. Biddle*, 181 Pa. St. 361; *Insurance Com'r v. Provident Aid Soc.*, 89 Me. 413, 36 Atl. 627; post, note 86.

²² *Bent v. Hart*, 73 Mo. 641.

§ 248. Except in cases of estoppel

(a) By judgment, or

(b) By his having consented to a settlement with the original insured, a reinsurer may, when sued, avail himself of all defenses which the original insurer could have made against its liability.

Construction of Contract of Reinsurance.

A court will not enlarge the liability under a contract of reinsurance beyond the limits clearly and expressly fixed by the policy, nor speculate as to the intention of the parties in procuring the reinsurance. It may be for the whole or part of the risk taken by the original insurer. In fire insurance the general rule is that the original insurer retains part of the risk; and, in event of total loss, to the extent of the amount retained, shares the loss with the reinsurers. Reinsurance not to take effect except above a stated amount of loss, is of a special character; and cannot be inferred from the mere statement of the original insurer made while effecting the contract that "we carry our line," especially where the policy is in the ordinary form and covers loss to a specified amount.²³ A reinsurer who assumes the "contingent liability" of another insurer is not liable for a loss which had occurred before the assumption.²⁴ But a loss which had already happened, and of which both parties were ignorant, is

²³ *Chalaron v. Insurance Co. of North America*, 48 La. Ann. 1582, 36 L. R. A. 742; *London Assur. Corp. v. Thompson*, 22 App. Div. 64, 47 N. Y. Supp. 830; *Insurance Co. of State of Pennsylvania v. Tel-fair*, 61 N. Y. Supp. 322; *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 1 Sup. Ct. 583; *Royal Ins. Co. v. Home Ins. Co. (C. C. A.)*, 68 Fed. 698; *Philadelphia Life Ins. Co. v. American L. & H. Ins. Co.*, 23 Pa. St. 65; *Fame Ins. Co.'s Appeal*, 83 Pa. St. 396; *Com. Ins. Co. v. Globe Mut. Ins. Co.*, 35 Pa. St. 475; *London & L. Fire Ins. Co. v. Lycoming Fire Ins. Co.*, 105 Pa. St. 424; *St. Nicholas Ins. Co. v. Merchants' Mut. F. & M. Ins. Co.*, 11 Hun (N. Y.), 108; post, note 38 et seq.

²⁴ *Olsen v. California Ins. Co.*, 11 Tex. Civ. App. 371, 32 S. W. 446.

covered when the reinsurance relates back to the date of the primitive insurance.²⁵ Where there are no circumstances indicating the intent of the parties, and no time is specified in the contract, the risk will be deemed to have commenced at the date of the contract, e. g.—an agreement to issue a policy of reinsurance in the usual form and for the usual premium, made after the property was destroyed, of which fact both parties were ignorant, will not become operative by relating to the beginning of the original insurance, but will be deemed to commence at the date of the contract.²⁶

Where a contract to reinsure stipulates that the policy is to be subject to the same conditions and provisions as are or may be adopted by the company reinsured, the company reinsuring binds itself by what may be adopted by the reinsured properly pertaining to the risk.²⁷

A clause in a contract for reinsurance that "this policy is subject to the same risks, conditions, mode of settlement, and in case of loss payable at same time and in same manner as the policies reinsured," does not mean that the various terms of the reinsured policies as to risks, conditions, mode of settlement, time and manner of payment in case of loss and limitation period, are incorporated with and form a part of the con-

²⁵ Philadelphia Life Ins. Co. v. American L. & H. Ins. Co., 23 Pa. St. 65. In this case A. insured the life of B. on the 24th of February, 1851, with the privilege of insurance for another year. On the 31st of May, 1851, the insurer, A., obtained a reinsurance of the said risk from C. for the term of one year; but the time when the year was to begin or end was not stated. B., the insured, had died in a distant state several weeks before the second insurance was effected, but his death was unknown at the time to both parties. Held, that the reinsurance must be considered as taking effect on the 24th of February, and not on the 31st of May.

²⁶ Union Ins. Co. v. American Fire Ins. Co., 107 Cal. 327, 28 L. R. A. 692.

²⁷ Manufacturers' F. & M. Ins. Co. v. Western Assur. Co., 145 Mass. 419.

tract of reinsurance; but that the original policies furnish in themselves particulars of the basis upon which the contract of reinsurance stands, and that in all dealings with the original insured, the provisions of the policy issued to him are to be observed.²⁸

Life Insurance.

A condition of reinsurance imposed by an agreement between life insurance companies that each member desiring to be reinsured shall present a satisfactory transfer application, does not justify a refusal to reinsure a member on the ground that his application for transfer is not satisfactory on account of physical conditions and age, where the agreement provides for the reinsurance of members on the basis of their original applications and the rating of them at the same amount with premiums payable at the same dates.²⁹ When a reinsurer agrees to assume all the outstanding risks of another company, it cannot discriminate between the risks; nor will it be heard to object that at the time its policy was issued the risk covered thereby was not a safe or proper one for it to take. If policies are transferred *en bloc* it is held, unless an agreement appears to the contrary, that the conditions of each original policy remain unchanged. And where a transferee issues to a policy-holder of the transferrer, a policy which recites the surrender of his original policy, and makes the application and representations previously given a part of the new contract and a warranty, these will be held to relate to the date of the application for the first policy and not to the date of the issue of the latter one.³⁰ A prohibition in a gen-

²⁸ Faneuil Hall Ins. Co. v. Liverpool & L. & G. Ins. Co., 153 Mass. 63, 10 L. R. A. 423; ante, note 27.

²⁹ National Mut. Ins. Co. v. Home Ben. Soc., 181 Pa. St. 443.

³⁰ Cohen v. Continental Life Ins. Co., 69 N. Y. 300; Shaw v. Republic Life Ins. Co., 69 N. Y. 286.

eral insurance statute, or in a by-law, against insuring persons over sixty years of age, does not affect a member of an insurance company which has under authority of statute transferred its risks to, or reinsured them in, another company, though such member is at the date of the transfer or reinsurance beyond that age; nor is the transferee thereby prohibited from reinsuring him.³¹

Rescission.

In respect to the duty of disclosing all material facts pertinent to the subject of the risk, the case of reinsurance does not differ from that of an original insurance. The obligation in each case is one of *uberrimae fidei*. The one effecting the contract must act in good faith, and when asked, must give such information as he possesses affecting the character of the risk or the nature of the peril insured against. If representations are made as an inducement towards the procuring of the contract, they must be full and true. The duty of communication is independent of the intention, and is violated by the fact of misstatement or concealment even where there is no design to deceive. The exaction of information in some instances may be greater in the case of reinsurance than as between the parties to an original insurance. In the former, the party seeking to shift the risk he has already assumed, is bound to communicate all information which would be likely to influence the judgment and action of the reinsurer; while in the latter a party is "not bound, nor could it be expected that he would speak evil of himself." If the reinsured omits to perform this duty, whether from misapprehension of the probable effect of the communication, or from design, and the

³¹ Rand v. Massachusetts Ben. Life Ass'n, 18 Misc. Rep. 336, 42 N. Y. Supp. 26; Cathcart v. Equitable Mut. Life Ass'n, 111 Iowa, 471, 82 N. W. 964; Wiberg v. Minnesota S. R. Ass'n, 73 Minn. 297; Seymour v. Chicago Guaranty Fund Life Soc., 54 Minn. 147.

information would be material to the risk or to the amount of the premium to be charged, the policy of reinsurance will be voidable. This obligation of a faithful disclosure of all material facts is, however, to be understood in a reasonable sense. The rule exacts the information of facts, not contingencies. If the information is stated as opinion, expectation, or belief, it does not affect the policy if given in good faith. In such case the insurer takes the risk of the statement. If made in bad faith it will avoid the policy. Thus the representations that the primitive insured was a man of integrity and good business and financial standing, when he was not; that other reinsurance had been obtained, which would tend to show that other insurers approved the risk, when there was no other insurance; that the insurer carried and intended to retain a part of the risk, when in fact it did not retain any but reinsured the whole—are all instances of false representations which will warrant the reinsurer in cancelling any policy he may be induced to issue in reliance thereon.³² But the representation of an insurer that it would carry part of the risk, made in good faith and with the full expectation that this would be done, does not avoid a policy of reinsurance made in reliance on such statement which was rendered impossible of fulfilment by the unforeseen failure of the first insurer to put on board a cargo to the amount of the risk it had sought and accepted.³³ In this connection we must not overlook the distinction between a false representation of

³² *Traill v. Baring*, 10 Jur. (N. S.) 87, 3 Bigelow, Life & Acc. Cas. 233; *Foster v. Mentor Life Assur. Co.*, 3 El. & Bl. 48, 3 Bigelow, Life & Acc. Cas. 113; *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. (N. Y.) 359; *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 1 Sup. Ct. 598; *Cohen v. Continental Life Ins. Co.*, 69 N. Y. 300.

³³ *Chalaron v. Insurance Co. of North America*, 48 La. Ann. 1582, 36 L. R. A. 742.

a material fact which makes the contract a nullity, and an oral promissory representation or warranty, made in good faith before the execution of the written contract, in regard to the intention, purpose, or future conduct of the promisor.³⁴

Conditions and Stipulations of Policy.

Where the blank form of policy used for reinsurance is that of the ordinary policy of insurance, and contains the conditions that no action can be maintained thereon until after an award made as specified fixing the amount of the claim, nor unless commenced within twelve months after the loss, these conditions are inapplicable to the contract of reinsurance and the right to recover is not affected thereby.³⁵ A clause to the effect that the reinsurer is made the agent of the original waiver for the purpose of doing in regard to all outstanding policies covered by the contract of reinsurance, all acts necessary to transfer said policies according to their terms and conditions, does not make the reinsurer the sole agent for that purpose, nor prevent the original insurer from consenting to a transfer. Unless a contrary intention clearly appears, the original insurer can assent to any reasonable and proper waiver of the conditions of its own policy which does not influence a loss or increase the burdens of the reinsurer. A stipulation that the policy of reinsurance is subject to the same conditions and terms as the original policy, is construed to mean only that these provisions regulate the basis on which the original contract stands and dealings with the original insured.³⁶ But the reinsurer is discharged from liability to the

³⁴ Prudential Assur. Co. v. Aetna Life Ins. Co., 23 Fed. 438; Union Mut Life Ins. Co. v. Mowry, 96 U. S. 544.

³⁵ Jackson v. St. Paul F. & M. Ins. Co., 99 N. Y. 124; Eagle Ins. Co. v. La Fayette Ins. Co., 9 Ind. 443.

³⁶ Fire Ins. Ass'n v. Canada F. & M. Ins. Co., 2 Ont. 481, 495; Cashau v. Northwestern Nat. Ins. Co., 5 Biss. 476, Fed Cas. No. 2499; Manu-

original insurer if the latter, without consent of the former, subsequent to the making of a contract of reinsurance which by its terms becomes void in case of the use of the property insured for the storage of articles denominated as extra hazardous, for an additional premium grants its assured the privilege of carrying extra hazardous goods.³⁷ A condition that in case of loss the reinsurer shall pay *pro rata* at and in the time and manner of the reinsured, means that the reinsurer shall have all the advantages of the time and manner of payment specified in the original policy. It has no reference to the insolvency of the reinsured.^{37a}

Extent of Liability of Reinsurer.

The liability of a reinsurer is to be determined by the wording of its agreement interpreted in accordance with the ordinary rules governing the construction of contracts, giving effect as far as possible to the expressed intention of the parties. The courts will not enlarge this liability beyond the limits clearly and expressly fixed by the agreement itself. The contract is primarily one of indemnity. To indemnify means to secure one against, or to compensate one for, damage or loss that may happen from a given act or event. The rights of an original insured for whose benefit reinsurance

facturers' F. & M. Ins. Co. v. Western Assur. Co., 145 Mass. 419; Faneuil Hall Ins. Co. v. Liverpool & L. & G. Ins. Co., 153 Mass. 63, 10 L. R. A. 423. But see North Pennsylvania Fire Ins. Co. v. Susquehanna Mut. Fire Ins. Co., 2 Pears. (Pa.) 291.

³⁷ St. Nicholas Ins. Co. v. Merchants' Mutual F. & M. Ins. Co., 83 N. Y. 604. As to proofs of loss, see ch. XIII. And see Cashau v. Northwestern Nat. Ins. Co., 5 Biss. 476, Fed. Cas. No. 2499; Yonkers & N. Y. Fire Ins. Co. v. Hoffman Fire Ins. Co., 6 Rob. (N. Y.) 316; New York Bowery Fire Ins. Co. v. New York Fire Ins. Co., 17 Wend. (N. Y.) 359; Consolidated R. E. & F. Ins. Co. v. Cashow, 41 Md. 59.

³⁷ Cashau v. Northwestern Nat. Ins. Co., 5 Biss. 476, Fed. Cas. No. 2499, and cases cited in note 44a, post.

has been effected, are determined by his contracts, as in a case of simple insurance. When an original insurer seeks to enforce a contract by which it has sought to shift part of its liability to another, a different question is presented. In such case he must show (1) the existence and extent of a loss covered by the original policy; (2) his own liability for that loss, and (3) that the reinsurer has assumed this liability in whole or in part. The reinsurer is only liable for the amount for which the original insurer is legally liable; in no case beyond the amount of the reinsurance. The former may make any defense against the latter which the latter might make against the original insured.³⁸

A policy providing that it is "subject to the same causes and conditions as the original policy, and to pay as may be paid thereon" does not bind the reinsurer to pay such sum as the insurer may choose to pay the insured, whether liable or not. It means the amount of the actual liability of the original insured.³⁹ And in an obligation to pay a loss in such amounts, at such times, and in such manner as the original insured may pay, the words "may pay" signify "may be liable to pay."⁴⁰ The assumption of the contingent liability of an insurer, does not include its obligations on account of losses which have already occurred.⁴¹

From the very fact that the underlying principle of a contract of reinsurance is that of indemnity to the original in-

³⁸ Ante, notes 1-3; notes 23-31; *Commercial Mut. Ins. Co. v. Detroit F. & M. Ins. Co.*, 38 Ohio St. 11; *London & L. Fire Ins. Co. v. Lycoming Fire Ins. Co.*, 105 Pa. St. 424; *Union Marine Ins. Co. v. Martin*, 35 Law J. C. P. 181; *Delaware Ins. Co. v. Quaker City Ins. Co.*, 3 Grant Cas. (Pa.) 71; *Illinois Mut. Fire Ins. Co. v. Andes Ins. Co.*, 67 Ill. 363.

³⁹ *Chippendale v. Holt*, 65 Law J. Q. B. 104, 73 Law T. (N. S.) 472; ante, note 4.

⁴⁰ *Fame Ins. Co.'s Appeal*, 83 Pa. St. 396.

⁴¹ *Olsen v. California Ins. Co.*, 11 Tex. Civ. App. 371, 32 S. W. 446.

surer, it follows that the extreme limit of the liability of the reinsurer is the amount for which the reinsured is legally liable, or, where the latter has settled with the original insured for less than the whole of his legal claim, the amount for which the settlement was made. The reinsured will not be allowed to profit by the transaction. When an insurance company, after having taken a risk and reinsured it in another company to indemnify itself against loss under its own policy, discharges its liability by payment of a sum less than the amount of its debt to the insured and within the amount of the reinsurance, the sum so paid will be taken and regarded as the amount of damage sustained and as the measure of indemnity to be recovered. It is not necessary for the reinsured to pay the loss to the first insured before proceeding against the reinsurer. So long as his liability to pay continues he is entitled to recover to the full extent of such liability. If he has paid the amount for which he was holden in law he is to the extent of the reinsurance entitled to recover the same from his reinsurer.⁴² Nor is the liability of the latter affected by the insolvency of the reinsured, or his inability to fulfill his own contract with the first insured;⁴³ but in such case a court of equity may compel the reinsurer to pay the amount of its liability directly to the original insured or the one ultimately entitled to the money.⁴⁴

⁴² *Illinois Mut. Fire Ins. Co. v. Andes Ins. Co.*, 67 Ill. 363; *Merchants' Mut. Ins. Co. v. New Orleans Mut. Ins. Co.*, 24 La. Ann. 305; *Bainbridge v. Neilson*, 10 East, 346; *Fame Ins. Co.'s Appeal*, 83 Pa. St. 396; ante, notes 38, 39. Contra, *Gantt v. American Cent. Ins. Co.*, 68 Mo. 503.

⁴³ *Consolidated R. E. & F. Ins. Co. v. Cashow*, 41 Md. 61; *Strong v. American Cent. Life Ins. Co.*, 4 Mo. App. 7; *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. (N. Y.) 137, 2 Bennett, *Fire Ins. Cas.* 580; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; ante, note 42.

⁴⁴ *Hunt v. New Hampshire F. U. Ass'n*, 68 N. H. 305, 38 Atl. 145, 38 L. R. A. 514.

Pro rata Clause.

Where the policy of reinsurance contains this clause: "loss, if any, payable *pro rata*, at the same time and in the same manner as by the reinsured," in case of a loss the reinsurer will be bound to pay at the same rate the reinsured shall pay; so that if the reinsured pays only ten cents on the dollar of its insurance, the reinsurer will pay the same rate on the amount of its policy.^{44a}

Evidence of Liability of Reinsurer.

The reinsured, on the happening of a loss, may pay the insured at once, at the peril of having to prove his own liability in an action against the reinsurer; or he may await a suit against himself and give prompt notice of it to the reinsurer. In that event the reinsurer has a fair opportunity to exercise an election whether he will contest or admit the claim. It is his duty to act upon such notice, and either pay the loss and avoid the litigation, or assume the defense of it. If he does neither and does not authorize the reinsured to settle, he will be held to require that the suit will be carried on by the reinsured, who then becomes, by operation of law, his agent for that purpose. And if the reinsured then defends in good faith, the judgment will, as to all matters which are or could be litigated therein, be binding upon the reinsurer; and the latter will also become liable for all the necessary costs and expenses of the litigation, provided the former be held liable on the claim.⁴⁵ The reinsurer is not bound by a judg-

^{44a} Illinois Mut. Fire Ins. Co. v. Andes Ins. Co., 67 Ill. 363; Cashau v. Northwestern Nat. Ins. Co., 5 Biss. 476, Fed. Cas. No. 2,499; Ex parte Norwood, 3 Biss. 504, Fed. Cas. No. 10,364; Norwood v. Resolute Fire Ins. Co., 36 N. Y. Super. Ct. 552; Blackstone v. Alemannia Fire Ins. Co., 56 N. Y. 104, 4 Daly, 299.

⁴⁵ Jackson v. St. Paul F. & M. Ins. Co., 99 N. Y. 124; Gantt v. American Cent. Ins. Co., 68 Mo. 503; Insurance Co. of State of Pennsyl-

ment which he was not called upon to defend;⁴⁶ nor by an arbitration to which he is not a party;⁴⁷ nor by a compromise and settlement made without his consent and approval.⁴⁸

Defenses of Reinsurer.

A contract of reinsurance in favor of an insurer is, in one sense, wholly distinct from and disconnected with the original insurance. The reinsured, when he seeks to enforce such a contract, must prove his loss and claim in the same manner as the original insured must prove it against his insurer; e. g. he must prove, (a) that he had a risk upon the subject insured, (b) that there was a loss or destruction or happening of the contingency insured against, (c) that he incurred a liability thereby, and (d) that the reinsuring company has agreed to indemnify him to some extent from such liability. We have already seen that under some circumstances a judgment against the primitive insurer is binding and conclusive upon and against the reinsurer. In all other cases, except when the claim has been settled, or compromised, or adjusted with the approval or consent of the reinsurer, it may, when sued, make any defense which the original insurer could have made when it was sought to be held liable. And if the reinsured was not liable on its policy, a recovery cannot be had against the reinsurer. If the reinsured was liable in part, but only for a sum less than the amount of the reinsurance, the extent of

vania v. Telfair, 27 Misc. Rep. 247, 57 N. Y. Supp. 780; *New York State Marine Ins. Co. v. Protection Ins. Co.*, 1 Story, 458, Fed. Cas. No. 10,216.

⁴⁶ *Merchants' Mut. Ins. Co. v. New Orleans Mut. Ins. Co.*, 24 La. Ann. 305.

⁴⁷ *Glen v. Hope Mut. Life Ins. Co.*, 1 Thomp. & C. (N. Y.) 463, 4 Bigelow, Life & Acc. Cas. 337.

⁴⁸ *Commercial Union Assur. Co. v. American Cent. Ins. Co.*, 68 Cal. 430.

such liability will be the maximum of the liability of the reinsurer.

Thus the reinsurer may take advantage of the failure of the original insured to comply with the terms and conditions of his policy; e. g., his failure to give notice of loss in the required manner and within the specified time, or his failure to obtain proper consent to other insurance, or to a transfer of the property covered.⁴⁹ The reinsured is not bound by any compromise or settlement which it did not authorize;⁵⁰ and is discharged from all liability if, without its consent, the original insurer for an additional premium grants the assured the privilege of carrying extra hazardous goods in stock, where the policy of reinsurance by its terms becomes void in case the property insured is used for the storage of articles classed as extra hazardous;⁵¹ and may defend upon the ground that the reinsured procured the contract through fraud, or misrepresentation, or concealment of facts material to the risk to be carried.⁵² The reinsurer is entitled to insist upon the strict compliance by the reinsured with all the conditions, stipulations and requirements of the contract of reinsurance, just as the reinsured is entitled to a full compliance by the original insured with the terms and conditions of the primitive contract.⁵³ The consent of the reinsured to a transfer of the property insured, or an assignment of the policy, is

⁴⁹ *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; *Delaware Ins. Co. v. Quaker City Ins. Co.*, 3 Grant Cas. (Pa.) 71; *North Pennsylvania Fire Ins. Co. v. Susquehanna Mut. Fire Ins. Co.*, 2 Pears. (Pa.) 291; *Yonkers & N. Y. Fire Ins. Co. v. Hoffman Fire Ins. Co.*, 6 Rob. (N. Y.) 316; *Merchants' Mut. Ins. Co. v. New Orleans Mut. Ins. Co.*, 24 La. Ann. 305.

⁵⁰ Cases in note 45, ante.

⁵¹ *St. Nicholas Ins. Co. v. Merchants' Mut. F. & M. Ins. Co.*, 83 N. Y. 604.

⁵² Cases in notes 32-34, ante.

⁵³ Cases supra.

usually sufficient.⁵⁴ It is no defense that the original policy insured property for more than two thirds of its value, when there is no condition against so insuring in the policy of reinsurance.⁵⁵ When an ordinary blank form of an insurance policy is used for writing reinsurance, its conditions requiring an award and the bringing of suit within a given time are held inapplicable.⁵⁶

The Reinsurer can Purchase Offsets.

A reinsurer may purchase policies of the reinsured, and claims against the latter at less than their face value before the occurrence of a loss which it has reinsured; and in action by the assignee of the reinsured company to recover the reinsurance, the reinsurer may set off such claims and policies at their face value.⁵⁷

AMALGAMATION OR CONSOLIDATION OF COMPANIES.

§ 249. Legislative consent is necessary to a proper and legal consolidation of corporations.

The term "consolidation" is, however, often used as descriptive of an agreement between two insurance companies, whereby one, for a consideration, reinsures all the policies and takes over all the business of the other.

Such an agreement is lawful; but it does not per se constitute a novation, or destroy the rights of policy-holders against the reinsured.

§ 250. A mutual insurance company, which has the power to reinsure, may accept a transfer of the entire membership of a similar company; and, for an adequate consideration, may lawfully agree to issue, and may thereafter issue, to the mem-

⁵⁴ Ante, notes 35-37.

⁵⁵ North Pennsylvania Fire Ins. Co. v. Susquehanna Fire Ins. Co., 2 Pears. (Pa.) 289.

⁵⁶ Jackson v. St. Paul F. & M. Ins. Co., 99 N. Y. 124.

⁵⁷ Hovey v. Home Ins. Co., 13 Am. Law Reg. (N. S.) 511; In re Cleveland Ins. Co., 22 Fed. 200.

bers of the latter policies of reinsurance of the same nature as it is authorized to issue in cases of primitive insurance.

Such an arrangement binds only those members of the re-insured company who accept its benefits, or who ratify or adopt it.

§ 251. Special funds collected for a particular purpose are impressed with a trust in favor of that purpose. Their diversion to any other purpose is unlawful. They belong to the members who contributed them, in proportion to the amount of their contributions.

Generally.

A discussion of the general law governing the consolidation of corporations is beyond the scope of this work. We are interested here in that law only as it bears directly upon the effecting of reinsurance. The right to consolidate, in a legal sense, is not implied from the granting of a charter, or the enactment of a statute governing the formation of corporations. Special legislative authority is essential to the proper and legal consolidation of two or more corporate bodies; and an attempted illegal consolidation may be enjoined by a stockholder of either of the attempting corporations. But the requisite authority may exist in the original constitution of the corporations; or it may be granted by a subsequent statute; or an unauthorized consolidation may thereafter be ratified and legalized by statute. A stockholder cannot, however, be forced into membership in the new company nor compelled to take stock in it in exchange for his old stock.⁵⁸

Practically the same result as that effected by a consolidation, is often reached by an agreement between two insurance

⁵⁸ *Clearwater v. Meredith*, 1 Wall. (U. S.) 25; *Pearce v. Madison & I. R. Co.*, 21 How. (U. S.) 442; *Nugent v. Supervisors of Putnam County*, 19 Wall. (U. S.) 241; *Black v. Delaware & R. Canal Co.*, 24 N. J. Eq. 455; *Bishop v. Brainerd*, 28 Conn. 289; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42; post, note 84.

companies whereby one transfers its good will and business to the other, and has all its risks reinsured by that other, the reinsurer at the same time agreeing to carry out the contracts of the reinsured and pay the losses of its policy-holders directly to them and to indemnify the reinsured against all claims and liabilities of all nature whatsoever resulting from or arising out of the business. This is more than a contract of reinsurance. It is an agreement for the benefit of the policy-holders upon which they are entitled to maintain actions directly against the reinsurer, who is, as it were, a surety to the reinsured. But it does not release the latter from obligation to its policy-holders. They may have an action against each; but only one satisfaction. A novation is not complete until the creditor has accepted the substitution of debtors.⁵⁹ A contract of the nature above mentioned is, at least as far as the reinsuring feature is concerned, within the scope of the general powers of a stock insurance company, providing the act be not foreign to the purpose of its organization or opposed to its plan of operation. A company authorized only to insure against fire losses would not have the power to reinsure life policies; nor could a life insurance company reinsure against fire losses; nor could either reinsure the business of an accident company. But every company is justified in augmenting its own proper business, and in soliciting business, and in taking surplus business from any other company carrying similar lines of risks; and I can see no valid reason why what can be done with a number of isolated risks, cannot be done with a larger number, or with

⁵⁹ *Barnes v. Hekla Fire Ins. Co.*, 56 Minn. 41; *Johannes v. Phenix Ins. Co.*, 66 Wis. 50, 27 N. W. 414; *Hort's Case*, 1 Ch. Div. 307; *Harman's Case*, 1 Ch. Div. 326; *Cocker's Case*, 3 Ch. Div. 1; *In re Manchester & L. Life Assur. & Loan Ass'n*, 5 Ch. App. 640.

the entire list of risks carried by any company.⁶⁰ When one company reinsures all the risks of another insurer, it must take them *in toto*, and cannot complain as to the character of the risks, nor as to their undesirability as new risks, nor because some of those for whose benefit the contract was made have passed the insurable age limit, if when first insured they were insurable by the original insurer.⁶¹

The wisdom of an insurance company reinsuring all its risks and transferring its business to another company, presents no questions peculiar to the law of insurance. In such cases the general laws applicable to the management of business corporations obtain. A board of directors has the implied power to act for their corporation in the transaction of its ordinary and regular business. This power, however, relates to the management and supervision of such business, and does not extend to the material alteration of, or winding up of the business of the corporation except in case of necessity. But their will is supreme and their ideas and judgment as to the conduct of the corporate business must govern in the absence of fraud or breach of trust.⁶² Even though a board of directors has not the power to close up the business of their company, yet when the best interests of the company demand it, it is within their power and it is their duty to reinsure for the benefit of their policy-holders, and as a consideration therefor they can transfer the personal property of the corporation.⁶³ And where such reinsurance effected by a board of directors was unauthorized, if the reinsurer

⁶⁰ Ante, notes 9-13; *Brum v. Merchants' Mut. Ins. Co.*, 4 Woods (U. S.), 156, 16 Fed. 140.

⁶¹ Ante, notes 29-31; *Wiberg v. Minnesota S. R. Ass'n*, 73 Minn. 297.

⁶² *Elliott, Corp.* (3d Ed.) § 498 et seq.; ante, notes 20-22.

⁶³ *Jameson v. Hartford Fire Ins. Co.*, 14 App. Div. 380, 44 N. Y. Supp. 15; *Davenport Fire Ins. Co. v. Moore*, 50 Iowa, 619.

has executed and performed its agreement by paying all losses arising on account of the risks reinsured by it, the consideration cannot be recovered back.⁶⁴ In cases of fraud or gross mismanagement, or for improper diversion of corporate funds, the directors will be held liable to the policyholders.⁶⁵

Mutual Insurance Companies.

What has been said above concerning amalgamation, consolidation, reinsurance, and transfer of the total business of one stock company to another is, in the main, applicable to mutual insurance companies. The implied powers of these are, from the very purpose and nature of their organization and their plan of operation, less general and more restricted than are those of stock insurance companies. But every corporation, however created, or for whatever purpose, has, in addition to the powers specially granted to it, such other and further powers as are reasonably necessary to carry the powers expressly granted into execution. Necessary, in this sense, does not mean indispensable; it means suitable and proper to accomplish the end which the legislature had in view at the time of the grant of the charter, or at the time of the passage of the act authorizing incorporation.⁶⁶ The power to actually consolidate does not exist unless by special grant. But the obtaining of members is an essential to the very inception and existence of a mutual organization, and all proper increase in membership adds to the strength of the

⁶⁴ *Casserly v. Manners*, 9 Hun (N. Y.), 695; *Alexander v. Williams*, 14 Mo. App. 13.

⁶⁵ *Grayson v. Willoughby*, 78 Iowa, 83, 4 L. R. A. 365; *Casserly v. Manners*, 9 Hun (N. Y.), 695.

⁶⁶ *State v. Hancock*, 35 N. J. Law, 537; *People v. Pullman's Palace Car Co.*, 175 Ill. 125, 167; *Oglesby v. Attrill*, 105 U. S. 605; *Curtis v. Leavitt*, 15 N. Y. 9.

organization and the security of the members. The authority to procure additional members is both express and implied. The question is as to the authority to procure members through reinsurance. The authorities on this point are not numerous. In England the practice of mutual companies reinsuring the entire membership of similar companies has long obtained, in most cases with the sanction of the law as expressed by the granting of charters which contemplated the existence and use of such powers.⁶⁷ In Iowa it is held that a mutual insurance company may reinsure its risks and may transfer its property including premium risks as a consideration therefor.⁶⁸ The supreme court of the same state has also, on several occasions, recognized the correlative right of a mutual insurance company (a) to contract for the whole membership of another mutual company doing business of a nature similar to its own, and (b) to reinsure the live policies of the latter company.⁶⁹ So has the supreme court of New Jersey;⁷⁰ and others.⁷¹ A different rule obtains in Tennes-

⁶⁷ Cases cited in note 60, ante, and notes 9-13, ante.

⁶⁸ *Davenport Fire Ins. Co. v. Moore*, 50 Iowa, 626.

⁶⁹ *Grayson v. Willoughby*, 78 Iowa, 83, 4 L. R. A. 365; *Twiss v. Guaranty Life Ass'n*, 87 Iowa, 733, 55 N. W. 8; *Dishong v. Iowa L. & E. Ass'n*, 92 Iowa, 163, 60 N. W. 505; *Kennan v. Rundle*, 81 Wis. 212, 51 N. W. 428; *Cathcart v. Equitable Mut. Life Ass'n*, 111 Iowa, 471, 82 N. W. 964.

⁷⁰ *Smith v. Hunterdon County Mut. Fire Ins. Co.*, 41 N. J. Eq. 473.

⁷¹ *Brum v. Merchants' Mut. Ins. Co.*, 4 Woods (U. S.), 156, 16 Fed. 140; *Insurance Com'r v. Provident Aid Soc.*, 89 Me. 413, 36 Atl. 627. See, also, as bearing on this question, *Stamm v. Northwestern Mut. Ben. Ass'n*, 65 Mich. 317, 32 N. W. 710; *Alexander v. Williams*, 14 Mo. App. 13; *Cathcart v. Equitable Mut. Life Ass'n*, 111 Iowa, 471, 82 N. W. 964; *Bent v. Hart*, 73 Mo. 641; *Seymour v. Chicago Guaranty Fund Life Soc.*, 54 Minn. 147; *Fame Ins. Co.'s Appeal*, 83 Pa. St. 396; *National Mut. Ins. Co. v. Home Ben. Soc.*, 181 Pa. St. 443; *Rand v. Massachusetts Ben. Life Ass'n*, 18 Misc. Rep. 336, 42 N. Y. Supp. 26; *Rockhold v. Canton Masonic Mut. Benev. Soc.*, 129 Ill. 440, 21 N. E. 795; *Hamilton Mut. Ins. Co. v. Hobart*, 2 Gray (Mass.), 543; *People v.*

see;⁷² and in Ohio.⁷³ In Missouri it has been held that the power to reinsure does not authorize the transfer of all risks and property and the closing up of the business.⁷⁴ Where a power to reinsure is specially given, the terms of the grant must be strictly followed in the execution of the power.⁷⁵

A mutual company cannot bind its membership by an

Empire Mut. Life Ins. Co., 92 N. Y. 105; *Casserly v. Manners*, 48 How. Pr. (N. Y.) 219; *Mason v. Cronk*, 125 N. Y. 503; *Lovell v. St. Louis Mut. Life Ins. Co.*, 111 U. S. 264, 4 Sup. Ct. 394; *Upton v. Jackson* (Mich.), 4 Ins. Law J. 189; *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. (N. Y.) 359; *Insurance Co. of North America v. Hibernia Ins. Co.*, 140 U. S. 565; *Davenport Fire Ins. Co. v. Day* (Iowa), 11 Ins. Law J. 174; *Cannon v. Home Ins. Co.*, 53 Wis. 585; *Goodman v. Jedidjah Lodge*, 67 Md. 117; *McKean v. Biddle*, 181 Pa. St. 361; *Grobe v. Erie County Mut. Ins. Co.*, 24 Misc. Rep. 462, 53 N. Y. Supp. 628; ante, notes 9-13, 17-22, 29-31; *Greeff v. Equitable Life Assur. Soc.*, 160 N. Y. 19, 46 L. R. A. 288. In this connection the benefits and advantages afforded by the reinsurance must be considered. *Jameson v. Hartford Fire Ins. Co.*, 14 App. Div. 380, 44 N. Y. Supp. 15.

⁷² An agreement by which one life company transfers to another life company all of its assets in consideration of the latter's undertaking to reinsure all the risks, and to assume and pay all the debts and liabilities of the former company, is ultra vires and void, although the vendor company may be authorized by charter to reinsure its risks. *Smith v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch. 727.

⁷³ *State v. Monitor Fire Ass'n*, 42 Ohio St. 555. A company which has divided its business into two branches cannot transfer all the policies in one branch to another, under authority to reinsure with any mutual or other insurance company, so as to make a policyholder in one branch liable to assessment for losses on the policies transferred. *Beaver & T. Mut. Fire Ins. Co. v. Trimble*, 23 Up. Can. C. P. 252. And see *Relfe v. Columbia Life Ins. Co.*, 10 Mo. App. 169.

⁷⁴ *Price v. St. Louis Mut. Life Ins. Co.*, 3 Mo. App. 262; *Barden v. St. Louis Mut. Life Ins. Co.*, 3 Mo. App. 248. Compare *People v. Empire Mut. Life Ins. Co.*, 92 N. Y. 105; *Relfe v. Columbia Life Ins. Co.*, 10 Mo. App. 169; *Bent v. Hart*, 73 Mo. 641; *Alexander v. Williams*, 14 Mo. App. 13.

⁷⁵ *Ernest v. Nicholls*, 6 H. L. Cas. 400; *In re Merchants' & Tradesman's Assur. Soc.*, L. R. 9 Eq. 694; *Carr's Case*, 33 Beav. 542.

agreement to perform all the contracts of another company to its policy-holders, including liability for losses unpaid before the making of the contract;⁷⁶ nor can it issue to a reinsured a policy which it cannot issue to its own members. Thus a life and endowment insurance company which cannot issue endowment certificates to its own members cannot by contract impose a liability upon them for the payment of endowment certificates for another society.⁷⁷

Ultra Vires Contract

When an *ultra vires* contract is made, and performed on one side, the other contracting party cannot be permitted to enjoy the benefits received and escape all liability, but will be required in a proper action to account; in other words, the doctrine of the want of a proper power to contract cannot be invoked to aid a party to perpetrate wrong and injustice. But one whose position has not been changed or prejudiced by the *ultra vires* contract cannot reap any advantage from it.⁷⁸ A contract between a mutual fire insurance company and its policy-holders whereby the latter establish a fund for the purpose of guaranteeing the existing and future indebtedness of the company is *ultra vires* and void, where the power to make such a contract is not expressly conferred upon the company by its charter, and is not within its general powers for raising a fund to meet its losses and expenses. And the courts will not aid in its enforcement.⁷⁹ A mutual company cannot reinsure policies which it is prohibited to issue; and the fact

⁷⁶ Twiss v. Guaranty Life Ass'n, 87 Iowa, 733, 55 N. W. 8; State v. Monitor Fire Ass'n, 42 Ohio St. 555.

⁷⁷ Dishong v. Iowa L. & E. Ass'n, 92 Iowa, 163, 60 N. W. 505; Kennan v. Rundle, 81 Wis. 212, 51 N. W. 428; Grayson v. Willoughby, 78 Iowa, 83, 4 L. R. A. 365.

⁷⁸ Twiss v. Guaranty Life Ass'n, 87 Iowa, 733, 55 N. W. 8.

⁷⁹ Kennan v. Rundle, 81 Wis. 212, 51 N. W. 426.

that the reinsuring company has collected assessments for ordinary death losses from the holders of such policies, after the reinsurance was effected, does not estop it from denying liability under the prohibited clause in the policies.⁸⁰ But the general rule first mentioned is intended to promote justice; and the exceptions are not engrafted upon it to aid injustice, but rather to preserve the integrity of the body of substantive law. And the courts will, when possible, enforce the contracts of parties; especially when the contracts have been executed and are not merely executory. Thus where the directors of a company, acting in excess of their authority, reinsure the risks of the company and pay a consideration therefor, after which the reinsurer executes and performs its agreement by paying all losses on risks reinsured by it, the consideration cannot be recovered back because the obligation might have been, but was not in fact, repudiated as unlawful. Where the agreement made has been fully performed on both sides, it cannot be rescinded as unauthorized or in excess of corporate power, or because made by parties incapable of binding the corporations. The law would not enforce such an agreement as long as it remained executory; neither will the law annul it after it has been performed,⁸¹ nor will one be heard to retain the benefits and repudiate the obligations of his contracts. Thus where two insurance companies consolidate without legal authority, and one transfers all its assets to the other whose name and entity is preserved for the conduct of the joint business, this latter is bound for the

⁸⁰ *Dishong v. Iowa L. & E. Ass'n*, 92 Iowa, 163, 60 N. W. 505; *Rockhold v. Canton Masonic Mut. Benev. Soc.*, 129 Ill. 440, 21 N. E. 795.

⁸¹ *Casserly v. Manners*, 9 Hun (N. Y.), 695, 48 How. Pr. 219; *Cathcart v. Equitable Mut. Life Ass'n*, 111 Iowa, 471, 82 N. W. 964; *Alexander v. Williams*, 14 Mo. App. 13; *Jameson v. Hartford Fire Ins. Co.*, 14 App. Div. 380, 44 N. Y. Supp. 15.

obligations of the other so far as the assets transferred will liquidate them.⁸²

Who is Bound by a Reinsurance.

When reinsurance is effected by an insurer for the benefit of its policy-holders, these latter have the option of accepting or rejecting the new contract.⁸³ This is true whether the primitive insurer be a stock or a mutual company; and whether the insured be a mere policy-holder in the former, or an insured member in the latter. And even if a mutual company be authorized by law to reinsure upon a vote of a majority of its members, and to transfer its property to the reinsuring company as consideration for the reinsurance, still the rights of dissenting policy-holders are not necessarily affected by virtue of the reinsurance effected by their own company. The corporation would indeed have the authority to execute the power conferred upon it by proceeding in accordance with the terms of the grant. Every person who becomes a member of a corporation agrees, by necessary implication, that he will be bound by all acts and proceedings of the majority, duly done and had according to law, and within the scope of the corporate power and authority. But the majority of the stockholders of a corporation have no power to involve the minority in a reorganization without its consent, in such manner as to compel the minority to accept a new con-

⁸² *Brun v. Merchants' Mut. Ins. Co.*, 4 Woods (U. S.), 156, 16 Fed. 140; *Anglo-Australian Life Assur. Co. v. British Provident L. & F. Soc.*, 3 Giff. 521; *Cocker's Case*, 3 Ch. Div. 1; *Relfe v. Columbia Life Ins. Co.*, 10 Mo. App. 150; *People v. Empire Mut. Life Ins. Co.*, 92 N. Y. 105; *Reese v. Smyth*, 95 N. Y. 645; *Heman v. Britton*, 88 Mo. 549; *Lovell v. St. Louis Mut. Life Ins. Co.*, 111 U. S. 264, 4 Sup. Ct. 394.

⁸³ Note 8a, ante.

tractual relation with a new company.⁸⁴ An agreement to reinsure all the members of a mutual society may be binding on the reinsurer or the transferee of the assets of the reinsured company;⁸⁵ but this agreement becomes a contract only with such members of the latter company as consent to the change, and accept the liability of the new, in lieu of the old, company.⁸⁶ And if, after an *ultra vires* contract of reinsurance has been consummated, a policy-holder in the reinsured company has paid premiums to the reinsurer, and has not received from it a policy, he may recover from the latter the premiums paid with interest.⁸⁷

Ratification of Reinsurance Agreement.

We have already seen that an agreement for reinsurance may be binding as between two insurers and not binding upon the policy-holders. Any lawful contract which is intended for the benefit of policy-holders may be adopted or ratified by them; and from the time of its adoption, or ratification, becomes binding on them. Whether or not certain acts constitute adoption or ratification is a question of law. If the

⁸⁴ *Post v. Beacon V. P. & E. Co.* (C. C. A.), 84 Fed. 371; *Hamilton Mut. Ins. Co. v. Hobart*, 2 Gray (Mass.), 543; *Kittel v. Augusta, T. & G. R. Co.*, 78 Fed. 855; *Beneš v. Mill Owners' Mut. Fire Ins. Co.*, 103 Iowa, 465, 72 N. W. 674; *Price v. St. Louis Mut. Life Ins. Co.*, 3 Mo. App. 263-273; *Smith v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch. 727. But see *McKean v. Biddle*, 181 Pa. St. 361. The English rule would seem to be that, when amalgamation is provided for by the company's charter, the act of the majority binds all. *Harman's Case*, 1 Ch. Div. 326; *Hort's Case*, 1 Ch. Div. 307; *Cocker's Case*, 3 Ch. Div. 1; *In re Manchester & L. Life Assur. & Loan Ass'n*, 5 Ch. App. 640.

⁸⁵ Notes 9-13, 29-31.

⁸⁶ *Insurance Com'r v. Provident Aid Soc.*, 89 Me. 413, 36 Atl. 627; *Bent v. Hart*, 73 Mo. 641; *Grayson v. Willoughby*, 78 Iowa, 83, 4 L. R. A. 365; *People v. Empire Mut. Life Ins. Co.*, 92 N. Y. 105; *Mason v. Cronk*, 125 N. Y. 496; *Casserly v. Manners*, 48 How. Pr. (N. Y.) 219; *Smith v. Hunterdon County Mut. Fire Ins. Co.*, 41 N. J. Eq. 473.

⁸⁷ *Smith v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch. 727.

acts are of such a nature as to evidence the intent of the policyholder to take advantage of the benefit which he could accept or reject, and to consent to the substitution of the new contract in the place of the old, and to accept the responsibility of the reinsurer in place of the primitive insurer, then adoption, or ratification, or novation takes place. The mere payment of premiums to and taking receipts of the new company, even when amalgamation is lawful does not alone constitute a novation. It must appear that the new company had the corporate power to assume the contracts of the old company, that the fact of transfer was communicated to the insured, and his acceptance must be proved by acts which unequivocally denote his understanding and acceptance of the proposal and substitution.⁸⁸ The making of an application for insurance in the new company is not a ratification of a consolidation which will bar a claimant from procuring his remedy against the old company.⁸⁹ An act of legislature by which the members of several mutual fire insurance companies are made a new corporation, and which "shall not affect the legal right of any person," and is to take effect "when accepted by the members of said companies," does not constitute a member of one of the old companies, who does not expressly assent to it, a member of the new corporation, even though the act be duly accepted by a majority of the members of each of the old companies.⁹⁰

⁸⁸ Notes 85, 87; *Relfe v. Columbia Life Ins. Co.*, 10 Mo. App. 169.

⁸⁹ *Grayson v. Willoughby*, 78 Iowa, 83, 4 L. R. A. 365.

⁹⁰ *Hamilton Mut. Ins. Co. v. Hobart*, 2 Gray (Mass.), 543. See, also, *Lovell v. St. Louis Mut. Life Ins. Co.*, 111 U. S. 265; *People v. Empire Mut. Life Ins. Co.*, 92 N. Y. 105; *In re Family Endowment Soc.*, 5 Ch. App. 118; *Conquest's Case*, 1 Ch. Div. 334; *Hort's Case*, 1 Ch. Div. 307; *Cocker's Case*, 3 Ch. Div. 1; *Dowse's Case*, 3 Ch. Div. 384; *In re Manchester & L. Life Assur. & Loan Ass'n*, 5 Ch. App. 640; *In re Anchor Assur. Co.*, 5 Ch. App. 632; *Shaw v. Republic Life Ins. Co.*, 67 Barb. (N. Y.) 586; *Wynne's Case*, 28 Law T. (N. S.) 805; *Upton*

The Rights of Policy-holders Who Do Not Accept the New Contract.

The contract of an insurance company with its policy-holders implies that it will retain its assets in its own possession and continue its business. If it reinsures its risks and parts with its reserve the contract is at once broken at the option of the assured; the policy-holders are not obliged to pay premiums to another company unless they wish to, and are not bound to pay premiums to the company which has, by the transfer of its property, incapacitated itself from discharging its obligations when they mature; so they may treat the contract as broken and recover for its breach. Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated, and demand whatever damage he has sustained thereby. The question remains as to what is justly due in such a case. If the insurer be a stock or old-line company, the measure of damages is the amount which it will cost to obtain a similar policy in a reliable company; if for any reason, other insurance of equal value cannot be obtained, the measure of damages will probably be the amount of premiums paid with interest.⁹¹ In the case of a mutual insurance company violating its contract, the supreme court of the United States has held that the

v. Jackson (Mich.), 4 Ins. Law J. 189; Bennett v. City Ins. Co., 115 Mass. 241, 4 Ins. Law J. 109; Reese v. Smyth, 95 N. Y. 645; Barnes v. Hekla Fire Ins. Co., 56 Minn. 41; Johannes v. Phenix Ins. Co., 66 Wis. 50, 27 N. W. 414.

M. insured his life in the B. Company, which amalgamated with the E. Company, and ceased to do business. Subsequently a memorandum under the seal of the E. Company was indorsed on the policy, by which it agreed that it would be liable for the payment of the policy if future premiums were paid to it. They were so paid. Held, a complete novation. Miller's Case, 3 Ch. Div. 391.

⁹¹ May, Ins. (3d Ed.) §§ 358, 363b, 429.

insured is not entitled to recover the full amount of the premiums paid with interest, but that the value of the insurance while it has run should be deducted, leaving as the amount due what is called and known in insurance business as the "value of the policy" at the time of its surrender according to actuarial tables, less any premiums due the insurer.⁹² But in a mutual assessment company this "value of the policy" is largely conjectural. Speaking of an attempt to fix such damages the supreme court of Iowa⁹³ said this "would involve an estimate of what the value of a policy in an assessment life insurance company will be several years in the future, or, rather, what is the present value of a policy payable in the future. It is apparent that no estimate of its value can be made. It may be worth something or nothing, depending entirely on whether there shall be any assessable members when the policy shall mature." The Minnesota rule fixes the measure of damages as the difference between the cost of new insurance in a similar company for the term of the natural life of the insured according to the mortuary tables, and the cost of carrying the breached policy for the same term; or, if new insurance cannot be obtained, then the damage is the present value of the policy as of the date of estimated death, less the cost of carrying it from the date of the breach.⁹⁴

The Reserve or Trust Fund of Mutual Societies.

Monies collected from all or any of the classes into which the membership of a mutual company may be divided, for the

⁹² *Lovell v. St. Louis Mut. Life Ins. Co.*, 111 U. S. 264, 4 Sup. Ct. 395; *Smith v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch. 727.

⁹³ *Grayson v. Willoughby*, 78 Iowa, 83, 4 L. R. A. 365.

⁹⁴ *Ebert v. Mutual Reserve Fund Life Ass'n*, 81 Minn. 116, 83 N. W. 510. See, also, *People v. Empire Mut. Life Ins. Co.*, 92 N. Y. 105;

purpose of creating a special fund,—e. g. a mortuary, benefit, or reserve fund— are impressed with a trust in favor of the purpose for which they have been paid, and cannot, without the consent of the contributors, be diverted to any other use. And the general funds of such a company in excess of the amount necessary to liquidate the debts of the company belong to the membership whence they came.

Thus a statute authorizing the formation of a corporation to insure its members against loss by fire, and authorizing the making and enforcing of contracts of indemnity amongst its members, and the levying and collecting of assessments to pay losses, does not authorize the insuring of members for a fixed annual premium. The funds derived from assessments to pay losses are in their nature trust funds to be applied to the payment of such losses; hence the use of such funds, or any part thereof, for the purchasing of assets of another corporation, or for the payment of losses to members of such other corporation whose risks have been assumed, is a misapplication of funds.⁹⁵ Nor does the fact that a company is authorized to reinsure its risks, or is by statute permitted to discontinue its business and wind up its affairs, release it from its existing obligations to its members and policy-holders. It has no right to turn them over to another company without their consent; and policy-holders need not in order to protect their legal rights protest against the effort so to do.⁹⁶ If the result of such an unauthorized act is to induce the vendor company to cease to use its franchises, and to produce practical insolvency, the policy-holders may treat the

Mason v. Cronk, 125 N. Y. 503; Insurance Com'r v. Provident Aid Soc., 89 Me. 413, 36 Atl. 627; Alexander v. Williams, 14 Mo. App. 13; Casserly v. Manners, 48 How. Pr., (N. Y.) 219, 9 Hun, 695.

⁹⁵ State v. Monitor Fire Ass'n, 42 Ohio St. 555; ante, notes 76, 77.

⁹⁶ People v. Empire Mut. Life Ins. Co., 92 N. Y. 105; note 86.

contract as broken and proceed to subject the transferred trust funds and other corporate property to the satisfaction of their claims. Securities deposited with a state insurance department, by an insurance company, or a bond given in lieu of such securities, constitute a special trust fund for the benefit of the policy-holders of that company. A transfer of its assets does not transfer this fund discharged of its trust, so that the reinsuring company may apply it in payment of its general creditors. If the reinsuring company withdraw such fund and replace it with its own, the latter will be affected with the trust attached to the withdrawn deposit.⁹⁷ When a trust fund reaches such proportions as to make it safe and prudent to divide the net income amongst its members, such division may be made, even though against the wish and protest of the minority.⁹⁸

Each member of a mutual company has an undivided interest in accumulated trust funds to which he has contributed, in proportion to the amount of his contributions, and subject to the laws of the organization. The majority of the membership can no more deprive a dissenting member of his share in such fund, small and undivided though the portion be, by an agreement to consolidate with, or reinsure with, and transfer the corporate assets to another company, than they can compel him to assume membership in the new company.

⁹⁷ *Lovell v. St. Louis Mut. Life Ins. Co.*, 111 U. S. 264; *People v. Empire Mut. Life Ins. Co.*, 92 N. Y. 105; *Reese v. Smyth*, 95 N. Y. 645; *Relfe v. Columbia Life Ins. Co.*, 10 Mo. App. 151; *Smith v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch. 727; *In re Family Endowment Soc.*, 5 Ch. App. 118; *Brum v. Merchants' Mut. Ins. Co.*, 4 Woods (U. S.), 156, 16 Fed. 140; *Hughes v. Hunner*, 91 Wis. 116, 64 N. W. 887; ante, notes 82, 86, 94.

⁹⁸ *McKean v. Biddle*, 181 Pa. St. 361; *Fry v. Provident Sav. Life Assur. Soc.* (Tenn. Ch. App.), 38 S. W. 116; *Greeff v. Equitable Life Assur. Soc.*, 160 N. Y. 19, 46 L. R. A. 288; *Jameson v. Hartford Fire Ins. Co.*, 14 App. Div. 380, 44 N. Y. Supp. 15.

When the new contract is made it binds only those who consent. When a company reinsures all its risks and has a large sum of money in the treasury, being the proceeds of assessments paid by their present and past policy-holders, it is held that all the policy-holders who contributed to such surplus, are entitled to a proportion thereof according to the amount of their respective payments, whether they continued to be policy-holders to the date of the distribution or not.⁹⁹ A mortuary fund, being a special trust fund, will be distributed so as to secure protection to all. And where the membership of a company divides into two classes, a reinsuring, and a non-reinsuring, the fund will be divided between the two in proportion to the amount of their policies held by each class.¹⁰⁰ Where a mutual endowment association, whose policies are paid from assessments, is dissolved, the holders of immature policies can only share in the assets after the payment of other liabilities.¹⁰¹ A new company organized to carry on an insurance business of the same general nature as an illegally incorporated association of the same name, and composed of some of the old membership, is not liable upon a policy issued by the old company even though the reserve fund of the latter has been transferred to the other in consideration of certain advantages offered to the old membership.¹⁰² But a mutual benefit association, that has created

⁹⁹ *Smith v. Hunterdon County Mut. Fire Ins. Co.*, 41 N. J. Eq. 473; *Bird v. Mutual Union Ass'n*, 30 App. Div. 346, 52 N. Y. Supp. 1044; *In re Youths' Temple of Honor*, 73 Minn. 319, 76 N. W. 59.

¹⁰⁰ *Insurance Com'r v. Provident Aid Soc.*, 89 Me. 413, 36 Atl. 627.

¹⁰¹ *In re Educational Endowment Ass'n*, 56 Minn. 171. Otherwise if the certificates have matured. *Failey v. Fee*, 83 Md. 83, 34 Atl. 839, 32 L. R. A. 311. See *Corey v. Sherman*, 96 Iowa, 114, 64 N. W. 828, 32 L. R. A. 490; *People v. Life & Reserve Ass'n*, 150 N. Y. 94; *Farmers' L. & T. Co. v. Aberle*, 18 Misc. Rep. 257, 41 N. Y. Supp. 638; *Temperance Mut. Ben. Ass'n v. Home Friendly Soc.*, 187 Pa. St. 38.

¹⁰² *Adams v. Northwestern E. & L. Ass'n*, 63 Minn. 184. See, also, *Reese v. Smyth*, 95 N. Y. 645; *Heman v. Britton*, 88 Mo. 549.

an endowment fund, cannot, on being refused a license in the state in which it was incorporated and thus compelled to cease business, organize a new company, and, against the protest of members of the old company use such endowment fund to obtain reinsurance of the old members in the new company; and an action may be maintained to wind up the affairs of the old company and compel the distribution of the fund among those for whose benefit it was created.¹⁰³

¹⁰³ *Stamm v. Northwestern Mut. Ben. Ass'n*, 65 Mich. 317, 32 N. W. 710; *People v. Empire Mut. Life Ins. Co.*, 92 N. Y. 108; *Cahen v. Continental Life Ins. Co.*, 69 N. Y. 300; *Insurance Com'r v. Provident Aid Soc.*, 89 Me. 413, 36 Atl. 627; *Smith v. Hunterdon County Mut. Ins. Co.*, 41 N. J. Eq. 473. See, also, as to management and disposition of funds, *Greff v. Equitable Life Assur. Soc.*, 160 N. Y. 19, 46 L. R. A. 288; *McKean v. Biddle*, 181 Pa. St. 361; *Fry v. Provident Sav. Life Assur. Soc.* (Tenn. Ch. App.), 38 S. W. 116, and cases *supra*.

CHAPTER XX.

PRACTICE AND PROCEDURE.

§ 252. Practice and procedure in litigation involving insurance contracts is subject to the law and practice of the forum in which the action is pending.

The practice, pleadings, forms, and modes of procedure in actions upon contracts of insurance, must conform to that existing in the courts of record of the state within which such actions are brought. A contract will, in the absence of any stipulations to the contrary, be construed with reference to its validity and meaning by the law of the place where it is made; but the remedy for its enforcement must conform to the law, practice and procedure of the court enforcing it.¹

Jurisdiction of Courts.

The general rule is that stipulations providing for the determination of the rights of the parties to a contract by non-judicial tribunals are void, as being an attempt to oust the courts of their proper jurisdiction. But agreements for arbitration concerning collateral matters, as the amount of a liability, are valid.² The right to full resort to the courts will not be deemed to be taken away by inference, but only by unequivocal agreements, stated in the clearest and most explicit terms.³ An agreement not to sue except in the courts of the

¹ *Nederland Life Ins. Co. v. Hall* (C. C. A.), 84 Fed. 278.

² *Ante*, c. 15, Arbitration and Award.

³ *Supreme Lodge, O. S. F., v. Raymond*, 57 Kan. 647, 49 L. R. A. 373; *Grimbley v. Harrold*, 125 Cal. 24, 57 Pac. 558. See, also, *Loeffler v. Modern Woodmen of America*, 100 Wis. 79, 75 N. W. 1012.

state in which the insurer is located, is void.⁴ The appointment of an agent, upon whom service of summons can be made within the state, subjects a non-resident principal to the jurisdiction of the courts of the state, the same as if he were a resident.⁵ Statutes providing that, in suits or proceedings in which a foreign corporation shall be a party, if such corporation shall make application to remove any such suit into a federal court it shall be liable to certain penalties, and statutes which attempt to restrict the right of corporations to transfer cases from state to federal courts, where they would otherwise be entitled to do so, are void.⁶

Limitations on Time to Sue.

The time within which suits upon a contract must be brought may be limited by agreement between the parties.⁷ But such a limitation does not govern the time to bring suit upon an agreement to pay a loss.⁸ That an action was begun within the stipulated time need not be set forth in the complaint. The stipulation is for the benefit of the insurer, by whom it may be asserted or waived.⁹ A defendant is not es-

⁴ *Reichard v. Manhattan Life Ins. Co.*, 31 Mo. 518. Compare *Rodgers v. Mutual Endowment Assessment Life Ass'n*, 17 S. C. 406.

⁵ *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404; *Runkle v. Lamar Ins. Co.*, 2 Fed. 9; *Ex parte Schollenberger*, 96 U. S. 369. But the appointment of an agent to acknowledge service does not prevent the corporation from pleading want of jurisdiction of the court, on the ground that the subject-matter of the suit or the remedy sought is beyond the reach of the court. *Taylor v. Mutual Reserve Fund Life Ass'n*, 97 Va. 60, 45 L. R. A. 621.

⁶ *Home Ins. Co. v. Morse*, 20 Wall. (U. S.) 445; *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *Chicago, M. & St. P. Ry. Co. v. Becker*, 32 Fed. 849.

⁷ *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. (U. S.) 386. See, ante, p. 423, Terms and Conditions of Contract.

⁸ *Smith v. Glens Falls Ins. Co.*, 62 N. Y. 85.

⁹ *Fred Miller Brewing Co. v. Capital Ins. Co.*, 111 Iowa, 590, 82 N. W. 1023.

topped from claiming the benefit of the statute by the fact that the time for bringing the action, as limited by the policy, has expired, so that a new action cannot be brought;¹⁰ nor by the fact of the absence from the state of the officers and agents upon whom service can be made.¹¹ In Pennsylvania it is held that an action on a policy of insurance, requiring suit to be brought within a year, is brought in time if the original summons is issued within a year, though it is afterwards set aside and an alias summons issued after the expiration of the year.¹² Where an action is instituted within the time limited, an amendment of the pleading, substituting a new party to represent the same right of recovery as permitted by statute, does not operate as a discontinuance of the suit, and the bringing of a new action. But a new cause of action cannot be substituted by amendment. The line is drawn between the amendment to the cause of action which is already the subject of the suit, and the substitution of a new cause of action by amendment.¹³ In Texas it is held that even where the making of proof of loss is a condition precedent to the right of action, a process of garnishment is not premature when served on an insurer before proofs of loss are furnished it.¹⁴ But this is doubtful law. The creditor can have no greater rights than his debtor, and cannot properly reach the debt as long as it is contingent, nor until it has

¹⁰ *Vore v. Hawkeye Ins. Co.*, 76 Iowa, 548.

¹¹ *Guthrie v. Connecticut Ind. Ass'n*, 101 Tenn. 643, 49 S. W. 829.

¹² *Everett v. Niagara Ins. Co.*, 142 Pa. St. 322, 21 Atl. 817.

¹³ *Fidelity & Casualty Co. v. Freeman* (C. C. A.) 109 Fed. 847, *Randolph v. Barrett*, 16 Pet. (U. S.) 138. An amendment by which the cause is changed from the law to the equity jurisdiction of the court continues the original cause of action. *Newman v. Covenant Mut. Ins. Ass'n*, 76 Iowa, 56, 1 L. R. A. 659.

¹⁴ *Phenix Ins. Co. v. Willis*, 70 Tex. 12.

become a moneyed demand, enforceable by the debtor himself.¹⁵

Form and Nature of Action.

A court of equity may reform a contract of insurance, and at the same time enforce it as reformed and administer full relief by decree of payment of loss when the evidence of the extent is satisfactory.¹⁶ And a cause of action in equity for specific performance of a contract to issue a policy may be joined with suit on the agreement for insurance, where a loss occurs before the policy is issued.¹⁷ A party to a contract which does not correctly represent the oral agreement made, cannot abandon it, and sue on the oral agreement, but recourse must be had to equity to rescind or reform it on the ground of fraud or mistake.¹⁸ In an action upon a policy without allegation of fraud or mistake, evidence cannot be received that a clause was inserted in the policy different from that agreed upon.¹⁹ But in Indiana it is held that if a misdescription of the location 'of the property' insured be written in the policy, without the knowledge or consent of the applicant, this may be alleged and proved in an ordinary action at law.²⁰ A contrary rule obtains in New York.²¹ And in Wisconsin it is held that where the insurer waives a condition against encumbrances by issuing a policy with knowl-

¹⁵ *Hurst v. Home Protection Fire Ins. Co.*, 81 Ala. 174; *German American Ins. Co. v. Hocking*, 115 Pa. St. 398.

¹⁶ *Maryland Home Fire Ins. Co. v. Kimmel*, 89 Md. 437, 43 Atl. 764. See c. 3.

¹⁷ *Preferred Acc. Ins. Co. v. Stone*, 61 Kan. 48, 58 Pac. 986. Compare *Fidelity & Casualty Co. v. Ballard & Ballard Co.*, 20 Ky. Law Rep. 1169, 48 S. W. 1074. See ante, c. 3.

¹⁸ *Kleis v. Niagara Fire Ins. Co.*, 117 Mich. 469, 76 N. W. 155.

¹⁹ *O'Donnell v. Connecticut Fire Ins. Co.*, 73 Mich. 1, 41 N. W. 95.

²⁰ *Phenix Ins. Co. v. Allen*, 109 Ind. 273, 10 N. E. 85.

²¹ *Sanders v. Cooper*, 115 N. Y. 279, 22 N. E. 212.

edge of the facts, the insured may recover on the policy without having it reformed so as to express the consent to encumbrances which the company agreed to endorse upon the policy.²²

There has been much question as to whether a suit upon a mutual benefit certificate should be at law or in equity. The distinction is clear between an agreement to pay a specific sum, and an agreement to pay the proceeds of an assessment. Upon principle it would seem that much depends upon the wording of the contract, and the provision made for payment of the benefit. If the right of the payee is solely to receive the proceeds of an assessment, and the validity of the claim is in question, it is but just to all that the right of recovery should be primarily determined. Until that is done an assessment cannot properly be made to pay the claim, and until the assessment is levied and paid it is impossible to know how much will be realized therefrom.²³ There are decisions to the effect that a bill in equity should be maintained to enforce payment of such certificates by compelling a specific performance of similar contracts, through assessments as stipulated.²⁴ But the authorities are numerous, and of high character, that the association is liable to suit for a breach of contract when it refuses to make the required assessment, the measure of damages being the amount assessable upon all insured, unless the defendant alleges in its answer and by proofs establishes the fact that it should be less.²⁵ It has also been held that

²² *Hobkirk v. Phoenix Ins. Co.*, 102 Wis. 13, 78 N. W. 160.

²³ *Rainsbarger v. Union Mut. Aid Ass'n*, 72 Iowa, 191, 33 N. W. 626; *Bailey v. Mutual Ben. Ass'n*, 71 Iowa, 689, 27 N. W. 770; *Neskern v. Northwestern E. & L. Ass'n*, 30 Minn. 406.

²⁴ *Covenant Mut. Ben. Ass'n v. Sears*, 114 Ill. 108; *Smith v. Covenant Mut. Ben. Ass'n*, 24 Fed. 685; *Tobin v. Western Mut. Aid Soc.*, 72 Iowa, 261; *Van Houten v. Pine*, 36 N. J. Eq. 133

²⁵ *Bentz v. Northwestern Aid Ass'n*, 40 Minn. 202; *Elkhart Mut.*

mandamus is not a proper remedy to compel such assessment.²⁶

Parties to Action.

The determination of the proper parties to an action upon an insurance policy must be largely governed by the law and practice of the forum regulating suits upon ordinary contracts. The policy itself designates the party to whom the proceeds are primarily payable, and a suit upon a policy must, as a general rule, except where otherwise provided by statute, be brought by the one designated in the contract as the payee, or his privies. In fraternal and mutual benefit organizations, a right of action is sometimes given by the articles of incorporation or by-laws of the society to those who would not otherwise be parties to the contract.²⁷ The right to the proceeds of the policy has been dealt with elsewhere.²⁸

Aid, Benev. & Relief Ass'n v. Houghton, 103 Ind. 286; *Earnshaw v. Sun Mut. Aid Soc.*, 68 Md. 465.

²⁶ *Burland v. Northwestern Mut. Ben. Ass'n*, 47 Mich. 424; *Excelsior Mut. Aid Ass'n v. Riddle*, 91 Ind. 84. But see *Van Houten v. Pine*, 36 N. J. Eq. 123; *Bailey v. Mutual Ben. Ass'n*, 71 Iowa, 689; *Tobin v. Western Mut. Aid Soc.*, 72 Iowa, 261; *Newman v. Covenant Mut. Ins. Ass'n*, 76 Iowa, 56, 40 N. W. 87; *Hart v. National Masonic Acc. Ass'n*, 105 Iowa, 717, 75 N. W. 508; *Theunen v. Iowa Mut. Ben. Ass'n*, 101 Iowa, 558, 70 N. W. 712. Compare *Follis v. United States Mut. Acc. Ass'n*, 94 Iowa, 435, 28 L. R. A. 78.

²⁷ *Ward v. Wood*, 13 Mass. 539; *United States Life Ins. Co. v. Ludwig*, 103 Ill. 305; *Bates v. Equitable Ins. Co.*, 10 Wall. (U. S.) 33; *Fairchild v. Northwestern Mut. Life Ass'n*, 51 Vt. 613; *Rosenberger v. Washington Mut. Fire Ins. Co.*, 87 Pa. St. 207.

A firm composed of several cannot recover upon a policy issued to one of them. *Burgher v. Columbian Ins. Co.*, 17 Barb. (N. Y.) 274. Where a policy provides for the payment of different sums to different parties, the beneficiaries should maintain separate actions to recover the several sums due. *Keary v. Mutual Reserve Fund Life Ass'n*, 30 Fed. 359. The remedy of one entitled to the proceeds of a policy of insurance is not against the party to whom the insurer has paid it, but against the insurer directly. *Shultz v. Boyd*, 152 Ind. 166, 52 N. E. 750.

²⁸ See ante, c. 4, *Payment of the Proceeds*.

A creditor, to whom a policy has been assigned as collateral security for a debt, may maintain an action in his own name, and recover the full face value of the policy, though a portion of the debt is not due at the time of bringing suit.²⁹ But an assignee who has no insurable interest in the life of the deceased, and who could not have taken out a policy in his own name, cannot maintain an action.³⁰ Where the policy is issued to the mortgagor to cover his interest alone, the action must be brought in his name.³¹ And so if the loss be payable to a mortgagee whose debt has been paid.³² The mortgagee may sue alone, and in his own name, where the loss, if any, is payable to him as his interest may appear, when his interest equals or exceeds the full amount due under the policy. When his interest is less, both insured and mortgagee should be joined as parties.³³ A mortgagee may maintain an action in his own name, on a Massachusetts Standard policy, procured by the mortgagor pursuant to a covenant to keep the premises insured for the benefit of the mortgagee, payable to the mortgagee as his interest might appear, and providing that no act or default of any person other than such mortgage, or those claiming under him, shall affect the mortgagee's right to recover in case of loss.³⁴

²⁹ *Hale v. Life Ind. & Inv. Co.*, 65 Minn. 548.

³⁰ *Warnock v. Davis*, 104 U. S. 775. See, also, ante, c. 9, *Insurable Interest*.

³¹ *Flanagan v. Camden Mut. Ins. Co.*, 25 N. J. Law, 506; *Columbia Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507.

³² *Coates v. Pennsylvania Fire Ins. Co.*, 58 Md. 172, 42 Am. Rep. 327.

³³ *Maxcy v. New Hampshire Fire Ins. Co.*, 54 Minn. 272; *Lowry v. Insurance Co. of North America*, 75 Miss. 43, 21 So. 664, 37 L. R. A. 779; *Bartlett v. Iowa State Ins. Co.*, 77 Iowa. 86, 41 N. W. 579.

³⁴ *Palmer Sav. Bank v. Insurance Co. of North America*, 166 Mass. 189, 44 N. E. 211. See *Whiting v. Burkhardt* (Mass.), 60 N. E. 1.

The Complaint.

In declaring upon a contract of insurance the pleader must bring himself within its terms, and show a loss from a cause and under circumstances which by the terms of the contract create a liability in favor of the plaintiff, and against the defendant. He must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged. He must show the making of the contract by the insurer, and that thereby the insurer obligated itself to protect him or his privies against specified perils in respect to certain property to a given amount, or to pay a certain sum upon the happening of a specified event, and that the event has happened, or the loss has occurred, while the policy was in force, and within its terms and conditions.³⁵ A complaint on a fire insurance policy must show that the property destroyed was at the time of the loss within the location described in the policy;³⁶ and that the insured was at the time of the loss the owner of the property, or had an insurable interest in it;³⁷ and that the property was at the time of the loss used for the purposes designated in the policy;³⁸ that the peril which the policy was issued to protect against was the proximate, and not the remote cause of the loss;³⁹ that damage was thereby done in respect to the interest insured;⁴⁰ and that the assured has performed all the conditions precedent required by the policy to be performed.⁴¹

³⁵ *Green v. Palmer*, 15 Cal. 412; *Allen v. Home Ins. Co. (Cal.)*, 30 Ins. Law J. 711, 65 Pac. 138.

³⁶ *Todd v. Germania Fire Ins. Co.*, 1 Mo. App. 472; *Phenix Ins. Co. v. Allen*, 109 Ind. 273, 10 N. E. 85.

³⁷ *Farmers' Ins. Co. v. Burris*, 23 Ind. App. 507, 55 N. E. 773; *Gustin v. Concordia Fire Ins. Co. (Mo.)*, 64 S. W. 178.

³⁸ *Allen v. Home Ins. Co. (Cal.)*, 30 Ins. Law J. 711, 65 Pac. 138.

³⁹ *Mutual Life Ins. Co. v. Stibbe*, 46 Md. 302; *Aetna Fire Ins. Co. v. Boon*, 95 U. S. 117.

⁴⁰ *Standard Fire Ins. Co. v. Wren*, 11 Ill. App. 242.

⁴¹ *Phenix Ins. Co. v. Pickel*, 119 Ind. 155, 21 N. E. 546.

Thus, if the furnishing of proofs of loss by the insured, is a condition precedent to the bringing of action, performance, or waiver of performance must be shown.⁴² Value in the property destroyed, and damage with respect to the insurable interest of the insured, must always be alleged.⁴³

Where, by the terms of the policy, which is set forth, an arbitration and award, in case of difference in regard to the amount of loss, is a condition precedent to the right of action, and it affirmatively appears from the complaint that a dispute has arisen which calls for an appraisal and award, a general allegation that the plaintiff has complied with all the terms and performed all the conditions precedent in the policy required of him, is insufficient. There should be a statement that appraisers had been selected, and an award made, or an allegation of facts which would relieve the insured from submitting to an appraisal and award, or excuse him from being bound by the provisions of the policy in that respect.⁴⁴ In a complaint upon an accident policy the complaint must show that the injury was of the nature insured against.⁴⁵ A policy need not be tendered to the insurer before commencing an action thereon.⁴⁶ A complaint based upon a life insurance policy, must bring the case within its limits and conditions. But where the circumstances are specifically set forth, an averment that plaintiff had performed all the terms and conditions upon his part required, is sufficient.⁴⁷ Where

⁴² *State Ins. Co. v. Belford*, 2 Kan. App. 280, 42 Pac. 409, 25 Ins. Law J. 127; *Excelsior Mut. Aid Ass'n v. Riddle*, 91 Ind. 84; *Home Ins. Co. v. Duke*, 43 Ind. 418.

⁴³ *German-American Ins. Co. v. Paul* (Ind. T.), 53 S. W. 442.

⁴⁴ *Mosness v. German-American Ins. Co.*, 50 Minn. 341.

⁴⁵ *Taylor v. Pacific Mut. Life Ins. Co.*, 110 Iowa, 621, 82 N. W. 326; *Whitlatch v. Fidelity & Casualty Co.*, 149 N. Y. 45, 43 N. E. 405.

⁴⁶ *Stephenson v. Bankers' Life Ass'n*, 108 Iowa, 637, 79 N. W. 459.

⁴⁷ *National Ben. Ass'n v. Bowman*, 110 Ind. 355.

a life policy is conditioned to be payable to an assignee, only on proof of an insurable interest, the fact and nature of such interest must be averred.⁴⁸ And it would seem that an averment of insurable interest upon the life, in favor of the party procuring the insurance, is always necessary.⁴⁹

Neither matters of defense, nor the performance or non-performance of conditions subsequent, need be pleaded by plaintiff. Where a policy contains conditions and warranties, it is sufficient for the plaintiff to show fulfillment of the conditions of recovery which are made such by the policy itself. He need not aver the truth of statements contained in the application, nor negative prohibited acts;⁵⁰ nor that the action was brought within the stipulated time;⁵¹ nor the authority of the insurer to do business in the state;⁵² nor negative losses from excepted causes.⁵³

Where a company agrees to make and deliver a policy within a reasonable time, and nothing as to the terms of insurance is left open, and it refuses to issue the policy after a loss, it has been held that the complaint need not show compliance with the conditions precedent of the policy.⁵⁴ But in New York the rights of one whose property is destroyed after an oral contract to insure it, but before a policy is issued, are subject to the provisions of the standard policy prescribed by law, and he can only recover by compliance with the condi-

⁴⁸ Alabama Gold Life Ins. Co. v. Mobile Mut. Ins. Co., 81 Ala. 329.

⁴⁹ Guardian Mut. Life Ins. Co. v. Hogan, 80 Ill. 35; Franklin Life Ins. Co. v. Sefton, 53 Ind. 380; Burton v. Connecticut Mut. Life Ins. Co., 119 Ind. 207, 12 Am. St. Rep. 405. See, also, ante, c. 9, Insurable Interest.

⁵⁰ Phenix Ins. Co. v. Pickel, 119 Ind. 155, 21 N. E. 546.

⁵¹ Fred Miller Brewing Co. v. Capital Ins. Co., 111 Iowa, 590, 82 N. W. 1023.

⁵² Fidelity & Casualty Co. v. Eickhoff, 63 Minn. 170.

⁵³ Schrepfer v. Rockford Ins. Co., 77 Minn. 291, 79 N. W. 1005.

⁵⁴ Western Assur. Co. v. MacAlpin, 23 Ind. App. 220, 55 N. E. 119.

tions required by the policy, and what must be proved must be alleged.⁵⁵

Amendment.

A complaint may be amended so as to continue or reassert the cause of action originally set forth, but not so as to substitute a new cause of action.⁵⁶

The Answer.

The burden is upon the insurer to plead and prove breaches of warranty or misrepresentations, and he must, in his pleading, single out the answers whose truth he proposes to contest, and show the facts upon which his contention is founded.⁵⁷ Where the defense of violation of law is insisted upon, it must be pleaded by defendant, who must also set forth in what the violation consisted.⁵⁸ The insurer must plead any violation of conditions of the policy upon which it relies in its defense;⁵⁹ and any failure to comply with conditions subsequent or precedent;⁶⁰ and the existence of other insurance, contrary to the terms of the policy, or which lessens liability;⁶¹ or forfeitures;⁶² and a want of insur-

⁵⁵ *Hicks v. British America Assur. Co.*, 162 N. Y. 284, 48 L. R. A. 424.

⁵⁶ *Fidelity & Casualty Co. v. Freeman (C. C. A.)*, 109 Fed. 847. See, ante, notes 12-15.

⁵⁷ *Chambers v. Northwestern Mut. Life Ins. Co.*, 64 Minn. 495; *Phenix Ins. Co. v. Pickel*, 119 Ind. 155, 21 N. E. 546. See, as to answers in insurance suits, 44 Cent. Law J. 407.

⁵⁸ *Conboy v. Railway Officials' and Employees' Acc. Ass'n (Ind. App.)*, 43 N. E. 1017.

⁵⁹ *Moody v. Amazon Ins. Co.*, 52 Ohio St. 12, 26 L. R. A. 313.

⁶⁰ *Moody v. Amazon Ins. Co.*, 52 Ohio St. 12, 26 L. R. A. 313.

⁶¹ *Aetna Ins. Co. v. McLead*, 57 Kan. 95, 45 Pac. 73, 25 Ins. Law J. 669.

⁶² *Guerin v. St. Paul F. & M. Ins. Co.*, 44 Minn. 20; *Ft. Wayne Ins. Co. v. Irwin*, 23 Ind. App. 53, 54 N. E. 818.

able interest in the plaintiff;⁶³ and that the plaintiff could have saved destroyed property by the exercise of reasonable care;⁶⁴ and that the action was not commenced within the time stipulated in the policy;⁶⁵ and that the loss was occasioned through the excepted causes.⁶⁶ It must specify the violation, or non-performance of conditions, and plainly state the conditions and breaches relied on;⁶⁷ and upon trial confine itself to those specified. If fraud is relied on, the facts constituting fraud should be stated.⁶⁸ Or if the defense is that the property was destroyed by the insured, that must be pleaded.⁶⁹ A plea that the conditions of the policy had been violated by the property becoming encumbered, should show that this was done without the assent of the insurer.⁷⁰

Reply.

The reply can assist, but must not quit or depart from the case made in the complaint.⁷¹ But it has been held where defendant denies the execution of a policy sued upon, and the authority of the agent to issue it, that the reply may set up the custom of the agent to accept similar risks, without the knowledge of the insurer, and a subsequent ratification of the agent's act.⁷²

⁶³ *Supreme Lodge, K. of H., v. Metcalf*, 15 Ind. App. 135, 43 N. E. 893.

⁶⁴ *Davis v. Anchor Mut. Fire Ins. Co.*, 96 Iowa, 70, 64 N. W. 687.

⁶⁵ *Fred Miller Brewing Co. v. Capital Ins. Co.*, 111 Iowa, 590, 82 N. W. 1023; *Moore v. Phoenix Fire Ins. Co.*, 64 N. H. 140.

⁶⁶ *Schrepfer v. Rockford Ins. Co.*, 77 Minn. 291, 79 N. W. 1005.

⁶⁷ *Chambers v. Northwestern Mut. Life Ins. Co.*, 64 Minn. 495; *Evarts v. United States Mut. Acc. Ass'n*, 61 Hun, 624, 16 N. Y. Supp. 27.

⁶⁸ *Sterling v. Mercantile Mut. Ins. Co.*, 32 Pa. St. 75.

⁶⁹ *Kahnweiler v. Phenix Ins. Co. (C. C. A.)*, 67 Fed. 483.

⁷⁰ *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 553.

⁷¹ *Mosness v. German-American Ins. Co.*, 50 Minn. 341. See, also, *Sun Fire Office v. Fraser*, 5 Kan. App. 63, 47 Pac. 327.

⁷² *German Fire Ins. Co. v. Columbia Encaustic Tile Co.*, 15 Ind. App. 623, 43 N. E. 41.

Waiver.

Waiver must be specially pleaded. It cannot be shown under a plea of performance.⁷³ But both waiver and compliance may be pleaded and shown.⁷⁴

Evidence.

It is a well settled rule of law that he who must affirm must prove, and that the burden of proving a loss from a cause, and under circumstances, and to an amount which creates a liability assumed by the insurer is upon the insured,⁷⁵ and the proof must come within the scope of, and correspond to the averment.⁷⁶ No rule of law is more firmly established than the one which declares that a parol agreement is merged into and superseded by a subsequent written agreement embracing the same subject matter. It is equally well settled and a general rule that parol evidence is inadmissible either to vary or contradict a written instrument.⁷⁷

The subject of the insurance is to be ascertained from the description in the policy, and such extrinsic evidence as may be necessary to identify the property described. But extrinsic evidence which goes beyond the purpose of aiding in the interpretation of the written contract, and tends to show that the subject, or any condition thereof, was other and different from that described in the written instrument,—as, for ex-

⁷³ *Mosness v. German American Ins. Co.*, 50 Minn. 341; *Ft. Wayne Ins. Co. v. Irwin*, 23 Ind. App. 53, 54 N. E. 818; *Continental Ins. Co. v. Vanlue*, 126 Ind. 410, 26 N. E. 119; *Guerin v. St. Paul F. & M. Ins. Co.*, 44 Minn. 20.

⁷⁴ *Stephenson v. Bankers' Life Ass'n*, 108 Iowa, 637, 79 N. W. 459.

⁷⁵ *Cory v. Boylston F. & M. Ins. Co.*, 107 Mass. 140, 9 Am. Rep. 20; *Allen v. Home Ins. Co. (Cal.)*, 30 Ins. Law J. 711, 65 Pac. 138; *Taylor v. Pacific Mut. Life Ins. Co.*, 110 Iowa, 621, 82 N. W. 326.

⁷⁶ *O'Donnell v. Connecticut Fire Ins. Co.*, 73 Mich. 1, 41 N. W. 95; *Coryeon v. Providence-Wash. Ins. Co.*, 79 Mich. 187.

⁷⁷ *Phenix Ins. Co. v. Allen*, 109 Ind. 273, 10 N. E. 85.

ample, that the building intended to be insured was not the building actually covered by the policy,—while it might tend to establish a case for the reformation of the contract, would be inadmissible to sustain an action to enforce the written contract, as though it applied to the building intended to be covered, but not described in the policy.⁷⁸

Parol evidence can only be received when an ambiguity exists, and never when the terms of the contract are plain and unambiguous. The writing itself is the best evidence of the intent and meaning. If the meaning be ambiguous, evidence may be received to place the court in the position of the parties, and enable it to appreciate the force of the words they used in reducing the contract to writing. It then becomes the duty of the court, sitting without a jury, to decide what the parties, thus situated, meant by the language used. But one party to a written contract cannot state how he understood it when he signed it, nor testify as to its meaning or his intent. What the parties intend must be gathered from the contract, read in the light of the circumstances surrounding them when they used the doubtful words.⁷⁹

The usage of a particular business, when it is reasonable, uniform, well-settled, not in opposition to the fixed rules of law, nor in contradiction of the express terms of the contract, is deemed to form a part of the contract, and to enter into the intention of the parties. The custom, however, must be shown to have been known to the parties when the contract was made, or to have been so generally known as to raise a presumption that they had it in mind at that time. Usage

⁷⁸ *Sanders v. Cooper*, 115 N. Y. 279, 22 N. E. 212; *Cummins v. German-American Ins. Co.*, 197 Pa. St. 61, 46 Atl. 902; *Baker v. State Ins. Co.*, 31 Or. 41, 27 Ins. Law J. 86, 48 Pac. 699.

⁷⁹ *Indemnity Mut. Marine Assur. Co. v. United Oil Co.*, 88 Fed. 315; *Rickerson v. Hartford Fire Ins. Co.*, 149 N. Y. 307, 43 N. E. 856.

is a matter of fact, not of opinion, and must be shown by those who have observed the method of transacting the particular kind of business, as conducted by others and themselves.⁸⁰

Where a policy designates a beneficiary by name, and states that she is the daughter of the insured, and it appears that he had a daughter of that name, parol evidence is inadmissible to show that the wife of the insured had the same name, and was intended to be the beneficiary.⁸¹ And the statement of a soliciting agent that a policy would take effect at once, cannot vary the effect of a written application, conditioned that the insurer would only become bound when it was received and accepted by the insured.⁸² But oral evidence is admissible to show that a misdescription of the property insured was written into the application, without the knowledge or consent of the insured; ⁸³ or that untrue statements in the application were made by the agent of the insurer, without the knowledge or consent of the applicant; ⁸⁴ or to show that the agent who drew the application, and wrote down the answer at the same time, knew that the answer was incorrect, where fraud or collusion between the agent and the applicant does not appear.⁸⁵

⁸⁰ Howard v. Great Western Ins. Co., 109 Mass. 384; Barnard v. Kellogg, 10 Wall. (U. S.) 383; Chesapeake Bank v. Swain, 29 Md. 483; Harris v. Tumbridge, 83 N. Y. 92.

⁸¹ Standard Life & Acc. Ins. Co. v. Taylor, 12 Tex. Civ. App. 386, 34 S. W. 781.

⁸² United States Mut. Acc. Ass'n v. Kitturing, 22 Colo. 257, 44 Pac. 595; Chamberlain v. Prudential Ins. Co. (Wis.), 85 N. W. 128.

⁸³ American Cent. Ins. Co. v. McLanathan, 11 Kan. 533; Phoenix Ins. Co. v. Allen, 109 Ind. 273, 10 N. E. 85.

⁸⁴ Marston v. Kennebec Mut. Life Ins. Co., 89 Me. 266, 36 Atl. 389; North American Fire Ins. Co. v. Throop, 22 Mich. 146.

⁸⁵ Patten v. Merchants' & Farmers' Mut. Fire Ins. Co., 40 N. H. 375; Sanders v. Cooper, 115 N. Y. 279, 22 N. E. 212.

If there is a written contract which does not contain the agreement of the parties as actually made, the insured cannot sue on the oral contract, but must resort to equity to rescind or reform the written one.⁸⁶ In an action upon a policy, the declaration being in the ordinary form, without allegation of fraud or mistake, evidence cannot be received to show that the contract is different from what it appears to be.⁸⁷ Where a company waives a condition against encumbrances, by issuing a policy with knowledge of the facts, the insured may recover on the policy, without having it reformed so as to express the assent to encumbrances, which was agreed to be endorsed upon the policy.⁸⁸

Parol evidence is admissible to show the meaning of technical words or phrases or trade terms,⁸⁹ where the meaning of the words is doubtful, and cannot be determined without the aid of extrinsic evidence.⁹⁰ Evidence is always admissible, in a proper action, to show fraud or mistake, entitling one party or the other to rescind or reform the contract. But the evidence must be clear and satisfactory.⁹¹

Tables showing the expectancy of human life are admissible, though not conclusive, upon the question of the dura-

⁸⁶ *Kleis v. Niagara Fire Ins. Co.*, 117 Mich. 469, 76 N. W. 155.

⁸⁷ *O'Donnell v. Connecticut Fire Ins. Co.*, 73 Mich. 1, 41 N. W. 95; *Sanders v. Cooper*, 115 N. Y. 279, 22 N. E. 212.

⁸⁸ *Hobkirk v. Phoenix Ins. Co.*, 102 Wis. 13, 78 N. W. 160; *Phenix Ins. Co. v. Allen*, 109 Ind. 273, 10 N. E. 85.

⁸⁹ *Astor v. Union Ins. Co.*, 7 Cow. (N. Y.) 202; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416; *Mooney v. Howard Ins. Co.*, 138 Mass. 375.

⁹⁰ *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 23 How. Pr. (N. Y.) 448; *Reid v. Lancaster Fire Ins. Co.*, 90 N. Y. 382.

⁹¹ *Rickerson v. Hartford Fire Ins. Co.*, 149 N. Y. 307, 43 N. E. 856; *Harrison v. Hartford Fire Ins. Co.*, 30 Fed. 862; *Harris v. Columbiana County Mut. Ins. Co.*, 18 Ohio, 116, 51 Am. Dec. 448.

tion of life;⁹² and an entry in the family bible to prove the date of birth.⁹³ The verdict of a coroner's jury, except when made so by the parties to the contract, is not, *per se*, evidence of the cause of death;⁹⁴ unless furnished to the insurer in connection with proofs of loss, in which case it becomes an admission in favor of the insurer, and against the claimant.⁹⁵ The books of an insured are admissible to show the amount of his business.⁹⁶ Offers of compromise cannot be shown.⁹⁷

When the question is whether a person did a certain act, his declarations, oral or written, made prior to, and about the time he is alleged to have done the act, to the effect that he intended to do it, are admissible as original evidence, if made under circumstances precluding any suspicion of misrepresentation.⁹⁸ So where in an action on a life insurance policy, the defense is fraudulent representations as to health, the insurer may prove statements and declarations of the insured, about the time of, and before and after the issuing of the policy.⁹⁹

Where the policy makes the application a part thereof, the policy is inadmissible without the application.¹⁰⁰ Where

⁹² Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545; Trott v. Chicago, R. I. & P. Ry. Co. (Iowa), 86 N. W. 33.

⁹³ Union Cent. Life Ins. Co. v. Pollard, 94 Va. 146, 36 L. R. A. 271.

⁹⁴ Wasey v. Travelers' Ins. Co. (Mich.), 85 N. W. 459. But see United States Life Ins. Co. v. Vocke, 129 Ill. 557.

⁹⁵ Mutual Life Ins. Co. v. Newton, 22 Wall. (U. S.) 32; Sharland v. Washington Life Ins. Co. (C. C. A.), 101 Fed. 206; Walther v. Mutual Life Ins. Co., 65 Cal. 417. See ante, Proof of Loss.

⁹⁶ Levine v. Lancashire Ins. Co., 66 Minn. 138; Coleman v. Retail Lumberman's Ins. Ass'n, 77 Minn. 31, 79 N. W. 588.

⁹⁷ Strome v. London Assur. Corp., 20 App. Div. 571, 47 N. Y. Supp. 481.

⁹⁸ Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285; Hale v. Life Ind. & Inv. Co., 65 Minn. 548.

⁹⁹ Welch v. Union Cent. Life Ins. Co., 108 Iowa, 224, 78 N. W. 853.

¹⁰⁰ Lycoming Mut. Ins. Co. v. Sailer, 67 Pa. St. 103

the defense is that the insured purposely burned his property, a preponderance of evidence establishing the defense is sufficient.¹⁰¹ Evidence of the character of the insured is not admissible in a suit on a fire insurance policy where the defense is that the plaintiff set fire to the building.¹⁰² But evidence is admissible to show that the house burned was in bad repute, and had the reputation of being a bawdy house.¹⁰³

Privileged Communication.

The insured may, in his application for insurance, waive the privilege of the law prohibiting physicians from disclosing information obtained by them while attending him in a professional capacity; and the waiver is not in contravention of any principle of public policy.¹⁰⁴ The waiver must be clearly expressed, and will not be extended by implication.¹⁰⁵

Death.

A living man is presumed to continue to live until the contrary is shown or is presumed from the circumstances of the case. Death may be shown, either by direct evidence, or inferentially, and from circumstances compelling that conclusion. The established presumption of fact from the disappearance of an individual under ordinary circumstances from whom his relatives and acquaintances have never afterwards heard, is that he continues to live for seven years after his disappearance. This, however, is only a presumption of fact,

¹⁰¹ *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59, 10 N. E. 636; *Somerset Co. Mut. Fire Ins. Co. v. Usaw*, 112 Pa. St. 80, 4 Atl. 355. But see *Germania Fire Ins. Co. v. Klewer*, 129 Ill. 599, 22 N. E. 489.

¹⁰² *American Fire Ins. Co. v. Hazen*, 110 Pa. St. 530; *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737.

¹⁰³ *Breckinridge v. American Cent. Ins. Co.*, 87 Mo. 62.

¹⁰⁴ *Foley v. Royal Arcanum*, 151 N. Y. 196, 45 N. E. 456; *Adreveno v. Mutual Reserve Fund Life Ass'n*, 34 Fed. 870.

¹⁰⁵ *Geare v. United States Life Ins. Co.*, 66 Minn. 91, 68 N. W. 731.

and when the facts from which it is drawn are modified the presumption and inference must, and ought to change.¹⁰⁶ The parties can agree as to, and make rules of evidence for themselves, as, e. g., that disappearance or absence is not proof of death.¹⁰⁷

Suicide.

The presumption of law is against suicide.¹⁰⁸ But this is a rebuttable presumption, and easily yields to physical facts clearly inconsistent with it. It is the exclusive province of the court to determine whether evidence is susceptible of a reasonable inference that death was caused by some other means than that of suicide, and that being determined in the affirmative it is the exclusive province of the jury to say wherein the truth lies.¹⁰⁹ The presumption against suicide does not obtain where the deceased is shown to have been affected with insanity of a nature usually attended with suicidal tendencies.¹¹⁰ Evidence of the statements of the deceased made prior to, and about the time of his death to the effect that he intended to commit suicide, are admissible.¹¹¹

Accidental Injury.

The law will presume that an injury was not self-inflicted, and to defeat a recovery the insurer must negative this pre-

¹⁰⁶ 2 Greenleaf Ev., § 278a; *Mutual Life Ins. Co. v. Newton*, 22 Wall. (U. S.) 32; *Northwestern Mut. Life Ins. Co. v. Stevens* (C. C. A.), 71 Fed. 258; *In re Mut. Ben. Co.'s Petition*, 174 Pa. St. 1, 34 Atl. 283; *Straub v. Grand Lodge, A. O. U. W.*, 37 N. Y. Supp. 750; *Johnson v. Pennsylvania R. Co.*, 43 App. Div. 453, 60 N. Y. Supp. 129.

¹⁰⁷ *Kelly v. Supreme Council of Catholic Mut. Ben. Ass'n*, 61 N. Y. Supp. 394.

¹⁰⁸ *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 54.

¹⁰⁹ *Agen v. Metropolitan Life Ins. Co.*, 105 Wis. 217, 80 N. W. 1020; *Wasey v. Travelers' Ins. Co.* (Mich.), 85 N. W. 459.

¹¹⁰ *Mutual Ben. Life Ins. Co. v. Daviess' Ex'r*, 87 Ky. 541, 9 S. W. 812; *Wasey v. Travelers' Ins. Co.* (Mich.), 85 N. W. 459.

¹¹¹ *Hale v. Life Ind. & Inv. Co.*, 65 Minn. 548; *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285.

sumption. But in cases where the very foundation of the action is accidental injury, the presumption which the law raises is only an aid to the other evidence on the subject, and does not operate to shift the burden of proof on the entire issue to the defendant. To entitle the plaintiff to recover at all, under a policy insuring only against accidental injuries, he must prove, by preponderance of the evidence, that his was an accidental injury.¹¹²

Insanity.

Sanity is always presumed, and suicide of itself alone does not raise a presumption of insanity. Yet the fact that the deceased did commit suicide may be properly considered by the jury, in connection with his previous demeanor and conduct, as an item tending to prove that he was insane.¹¹³

Forfeiture, Fraud, and Misrepresentation.

The defense of forfeiture, or termination of risk otherwise than by efflux of time, and consequent expiration of the contract of insurance, must be pleaded and proven by the insurer.¹¹⁴

¹¹² *Carnes v. Iowa State Traveling Men's Ass'n*, 106 Iowa, 281, 76 N. W. 683; *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572, 12 N. E. 372; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661.

¹¹³ *Karow v. Continental Ins. Co.*, 57 Wis. 56; *Wolff v. Connecticut Mut. Life Ins. Co.*, 2 Flip. 355, Fed. Cas. No. 17,929; *Ritter v. Mutual Life Ins. Co.*, 69 Fed. 505. As to evidence of insanity, see *Charter Oak Life Ins. Co. v. Rodel*, 95 U. S. 232; *Connecticut Mut. Life Ins. Co. v. Lathrop*, 111 U. S. 612; *John Hancock Mut. Life Ins. Co. v. Moore*, 34 Mich. 41; *Weed v. Mutual Ben. Life Ins. Co.*, 70 N. Y. 561; *Newton v. Mutual Ben. Life Ins. Co.*, 76 N. Y. 426; *Meacham v. New York State Mut. Ben. Ass'n*, 120 N. Y. 237, 24 N. E. 283; *Blackstone v. Standard Life & Acc. Ins. Co.*, 74 Mich. 592, 42 N. W. 156.

¹¹⁴ *Jones v. United States Mut. Acc. Ass'n*, 92 Iowa, 652; *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572; *Chambers v. Northwestern Mut. Life Ins. Co.*, 64 Minn. 495; *Newhall v. Union Mut. Fire Ins. Co.*, 52 Me. 180. See ante, Answer.

Expert Evidence.

Expert evidence will only be received from witnesses having special and peculiar knowledge concerning a subject matter of inquiry whereof the jury has not equal knowledge, and when the jury, with the facts before them, would not otherwise be able to form an intelligent opinion. It will not be received concerning matters of common knowledge, nor where the jury have, or are presumed to have, equal knowledge with the witnesses.¹¹⁵ Whether given circumstances increase a risk has been held to be a proper subject of expert testimony;¹¹⁶ and the cause of death;¹¹⁷ and the effect of a given disease upon a life;¹¹⁸ and whether given facts would affect the premium charged.¹¹⁹

Payment of Premium.

It is incumbent upon an insurer who alleges a non-payment of premium upon a contract admitted to have been once in force, to show the default whereby the obligation is claimed to have terminated.¹²⁰ But if the fact of the making of a valid and binding contract be in issue, the burden of proving

¹¹⁵ *Teerpenning v. Corn Exchange Ins. Co.*, 43 N. Y. 279; *Gulf City Ins. Co. v. Stephens*, 51 Ala. 121; *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72.

¹¹⁶ *Mitchell v. Home Ins. Co.*, 32 Iowa, 421; *Leitch v. Atlantic Mut. Ins. Co.*, 66 N. Y. 100; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416; *Schenck v. Mercer County Mut. Fire Ins. Co.*, 24 N. J. Law, 447; *Franklin Fire Ins. Co. v. Gruver*, 100 Pa. St. 266.

¹¹⁷ *Miller v. Mutual Ben. Life Ins. Co.*, 31 Iowa, 216, 7 Am. Rep. 122.

¹¹⁸ *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452; *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564.

¹¹⁹ *McLanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 188.

¹²⁰ *Tobin v. Western Mut. Aid Soc.*, 72 Iowa, 261, 33 N. W. 663; *Hodsdon v. Guardian Life Ins. Co.*, 97 Mass. 144; *Supreme Lodge, K. H. W., v. Johnson*, 78 Ind. 110; *Scheufler v. Grand Lodge, A. O. U. W.*, 45 Minn. 258; *Farmers' & Merchants' Ins. Co. v. Wiard*, 59 Neb. 451, 81 N. W. 312.

that fact, including the payment of the premium or an agreement for credit, rests upon the insured.¹²¹

Assessments.

The insurer must show that assessments have been regularly and duly made;¹²² and prove a failure to pay assessments;¹²³ and that an assessment, if made, would be insufficient to meet the requirements of a certificate.¹²⁴

Presumptions.

It is a general rule that a state of facts once shown to exist is presumed to continue until a change, or facts and circumstances inconsistent with its continued existence, are proved.¹²⁵ There is a presumption in favor of sanity, and the continuation of life, and in favor of honesty, good faith, and fair dealing; of the truth of warranties and representations, and against suicide or forfeiture.¹²⁶ Where premises are shown to have been vacated, a presumption of vacancy exists until subsequent occupation is shown.¹²⁷ Where a parol agreement to insure property is made without fixing the rate, the parties will be presumed to have contemplated the customary rates for similar risks;¹²⁸ and the issuance of a policy containing the usual and customary terms and conditions.¹²⁹

¹²¹ See ante, c. 3.

¹²² *Augusta Mut. Fire Ins. Co. v. French*, 39 Me. 522. *Atlantic Mut. Fire Ins. Co. v. Fitzpatrick*, 2 Gray (Mass.), 279.

¹²³ See ante, note 120.

¹²⁴ *Elkhart Mut. Aid, Benev. & Relief Ass'n v. Houghton*, 103 Ind. 286; *Bentz v. Northwestern Aid Ass'n*, 40 Minn. 202, 2 L. R. A. 784.

¹²⁵ *Northwestern Mut. Life Ins. Co. v. Stevens* (C. C. A.), 71 Fed. 260.

¹²⁶ See ante, notes 108-114.

¹²⁷ *Stoltenberg v. Continental Ins. Co.*, 106 Iowa, 565, 76 N. W. 835.

¹²⁸ *Cleveland, O. & P. Mfg. Co. v. Norwich Union Fire Ins. Co.*, 34 Or. 228, 55 Pac. 435.

¹²⁹ *Hicks v. British America Assur. Co.*, 162 N. Y. 284.

In the absence of evidence there is a presumption that a policy was delivered at its date, where, upon the death of the insured, it is found in the possession of the beneficiary.¹³⁰ There is a presumption that both parties to a contract knew the law of a state to which they agreed to make the contract subject;¹³¹ that notice properly addressed and sent by mail was received;¹³² that a foreign corporation has complied with the laws of a state wherein it is doing business;¹³³ that an injury was not self-inflicted;¹³⁴ that the vacancy of a detached and isolated building increases the hazard;¹³⁵ and against breach of condition or forfeiture.¹³⁶

A presumption, or presumptive evidence, is as original as is direct evidence, and the presumption of any fact is good as evidence of such fact, when the presumption is legitimate. The presumption stands for proof until rebutted.¹³⁷ But the presumption which the law raises is only an aid to the other evidence on the subject, and does not operate to shift the ultimate burden of proof.¹³⁸

Statutes Providing for Attorney's Fees.

Statutes providing for the allowance to the plaintiff in a suit against an insurance company of special damages and an

¹³⁰ *Kendrick v. Mutual Ben. Life Ins. Co.*, 124 N. C. 315, 32 S. E. 728; *Massachusetts Ben. Life Ass'n v. Sibley*, 158 Ill. 411, 42 N. E. 137.

¹³¹ *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327.

¹³² *Benedict v. Grand Lodge, A. O. U. W.*, 48 Minn. 471.

¹³³ *Fidelity & Casualty Co. v. Eickhoff*, 63 Minn. 170.

¹³⁴ *Taylor v. Pacific Mut. Life Ins. Co.*, 110 Iowa, 631, 82 N. W. 326.

¹³⁵ *Jones v. Granite State Fire Ins. Co.*, 90 Me. 40, 37 Atl. 326.

¹³⁶ See ante, notes 106-114.

¹³⁷ *Northwestern Mut. Life Ins. Co. v. Stevens (C. C. A.)*, 71 Fed. 260.

¹³⁸ *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661; *Taylor v. Pacific Mut. Life Ins. Co.*, 110 Iowa, 62, 82 N. W. 326; *Jones v. Granite State Fire Ins. Co.*, 90 Me. 40, 37 Atl. 326.

attorney's fee, in case the plaintiff recovers, without securing a like privilege to the defendant, are unconstitutional and void.¹³⁹

Contract Entire or Several.

In spite of the statement by a learned judge, that "it is well settled, by a uniform current of authority, that contract of insurance of this character" (referring to a policy for a single and entire premium, and furnishing indemnity for a gross sum, apportioned upon several distinct items of property) "is an entirety and indivisible, the sole effect of the apportionment of the amount of insurance upon the separate and distinct items of property named in the policy being to limit the extent of the insurer's risk as to each such item to the sum so specified,"¹⁴⁰ supported, as it is by a large array of strong authorities,¹⁴¹ it must be confessed that the decisions are far from being a unit on the question.

¹³⁹ *Williamson v. Liverpool, L. & G. Ins. Co.*, 105 Fed. 32; *Johnson v. Goodyear Min. Co.*, 127 Cal. 4, 59 Pac. 304, 47 L. R. A. 338; *Wilder v. Chicago & W. M. Ry. Co.*, 70 Mich. 382, 38 N. W. 289; *Wally's Heirs v. Kennedy*, 2 Yerg. (Tenn.) 554, 24 Am. Dec. 511; *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150; *Phenix Ins. Co. v. Clay*, 101 Ga. 331, 28 S. E. 853. But see *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 12, 29 L. R. A. 386; *Lancashire Ins. Co. v. Bush*, 60 Neb. 116, 82 N. W. 314. Compare *Jarman v. Knights Templars' & M. Life Ind. Co.*, 95 Fed. 70; *Phenix Ins. Co. v. Clay*, 101 Ga. 331, 28 S. E. 853.

¹⁴⁰ *Plath v. Minnesota Farmers' Mut. Fire Ins. Ass'n*, 23 Minn. 482.

¹⁴¹ 2 *Parsons, Contracts* (5th Ed.), 519; *Gottzman v. Pennsylvania Ins. Co.*, 56 Pa. St. 210; *Friesmuth v. Agawan Mut. Fire Ins. Co.*, 10 Cush. (Mass.) 587; *Brown v. People's Mut. Ins. Co.*, 11 Cush. (Mass.) 280; *Lee v. Howard Fire Ins. Co.*, 3 Gray (Mass.), 583; *Kimball v. Howard Fire Ins. Co.*, 8 Gray (Mass.), 33; *Lovejoy v. Augusta Mut. Fire Ins. Co.*, 45 Me. 472; *Richardson v. Maine Ins. Co.*, 46 Me. 394; *Gould v. York County Mut. Fire Ins. Co.*, 47 Me. 403; *Barnes v. Union Mut. Fire Ins. Co.*, 51 Me. 110; *Day v. Charter Oak F. & M. Ins. Co.*, 51 Me. 91; *McQueeney v. Phoenix Ins. Co.*, 52 Ark. 257, 20 Am. St. Rep. 179, 5 L. R. A. 744.

Mr. Parsons says: "If the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items."¹⁴² As applied to insurance policies, this rule would hold that where the amount of insurance is apportioned to distinct items, but the premium paid is gross, the contract is entire, and not divisible, and if avoided as to one item, it is avoided as to all.¹⁴³

In *McGowan v. People's Mut. Fire Ins. Co.*¹⁴⁴ the supreme court of Vermont said: "This is a question of great practical importance, as a large proportion of insurance contracts embrace more than one item of property insured. The decisions are apparently conflicting, but we think are easily reconciled by referring to the plain principles which should govern them. The general rule, 'void in part void in toto,' should apply to all cases where the contract is affected by some all-pervading vice, such as fraud, or some unlawful act, condemned by public policy or the common law; cases where the contract is entire and not divisible, and all those cases where the matter that renders the policy void in part, and the result of its being so rendered void, affects the risk of

¹⁴² 2 Parsons, Contracts, 519.

¹⁴³ *McQueeny v. Phenix Ins. Co.*, 52 Ark. 257, 20 Am. St. Rep. 179, 5 L. R. A. 744; *Garver v. Hawkeye Ins. Co.*, 69 Iowa, 202; *German-American Ins. Co. v. Commercial Fire Ins. Co.*, 95 Ala. 469, 16 L. R. A. 291; *Worachek v. New Denmark Mut. Home Fire Ins. Co.*, 102 Wis. 81, 78 N. W. 165; *Carey v. German-American Ins. Co.*, 84 Wis. 80, 20 L. R. A. 267. See, contra, *Havens v. Home Ins. Co.*, 111 Ind. 90, 12 N. E. 137; *Geiss v. Franklin Ins. Co.*, 123 Ind. 172, 24 N. E. 99; *Smith v. Agricultural Ins. Co.*, 118 N. Y. 518; *Coleman v. New Orleans Ins. Co.*, 49 Ohio St. 310, 16 L. R. A. 174; *Wright v. London Fire Ins. Ass'n*, 12 Mont. 474, 19 L. R. A. 211; *Continental Ins. Co. v. Ward*, 50 Kan. 346.

¹⁴⁴ 54 Vt. 211, 41 Am. Rep. 843, approved in *Loomis v. Rockford Ins. Co.*, 77 Wis. 87, 20 Am. St. Rep. 96. But see *Worachek v. New Denmark Mut. Home Fire Ins. Co.*, 102 Wis. 81, 78 N. W. 165.

the insurer upon the other items in the contract. Keeping these rules in mind, the leading cases upon this subject can all be reconciled. A recovery should be had in all those cases where the contract is divisible; the different properties insured for separate sums; and the risk upon the property, which is claimed to be valid, unaffected by the cause that renders the policy void in part."

The Indiana rule is that where property covered by a policy of insurance, although consisting of separate items, constitutes substantially one risk, and is necessarily subject or liable to destruction by the same conflagration, then even although separate amounts of insurance be apportioned to each separate item or class of property, if the consideration for the contract, and the risk are both indivisible, the contract must be treated as entire, and any breach of a stipulation, or any cause which renders the policy void as to part of the property insured, affects the other items in the same manner.¹⁴⁵

¹⁴⁵ Havens v. Home Ins. Co., 111 Ind. 90, 12 N. E. 137; Pickel v. Phenix Ins. Co., 119 Ind. 291, 21 N. E. 898; Geiss v. Franklin Ins. Co., 123 Ind. 172.

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